RELEVANT DOCKET ENTRIES

Order (*Weis*, Circuit Judge and Scalera, District Judge) granting appellant's motion to file petition for rehearing nunc pro tunc, filed.

Petition for Rehearing for appellant, filed. (rec'd 9/13/73) (10 copies) and Memorandum in Support of petition for rehearing en banc, rec'd for information of the Court.

Petition of Amicus Curiae for rehearing en banc, rec'd for information of the Court

Supplement to amicus curiae petition for rehearing before the Court en banc, rec'd for the information of the Court.

Order (Seitz, Van Dusen, Aldisert, Adams, Gibbons, Rosenn, *Weis* and Garth, C.J. and Scalera, D.J.) denying the petition for rehearing, filed.

Record returned to Clerk of D.C.

Receipt for record, filed.

Notice of filing (on December 3, 1973 of petition for writ of certiorari rec'd from Clerk of Supreme Court filed. (S.C. No. 73-5845).

Certified copy of order dated February 19, 1974 rec'd from Clerk of Supreme Court granting the motion to proceed in forma pauperis and granting the petition for writ of certiorari, filed. (S.C. No. 73-5845).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,
PLAINTIFF

—*vs.*—

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,
DEFENDANT

COMPLAINT

And Now, comes Plaintiff, Catherine Jackson, by her Attorneys, Alan Linder, Esquire and Albert G. Barnes, Jr., Esquire, in the above captioned matter, and respectfully represents:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to Title 28 USC Sections 1331 and 1343 (3) and (4). The amount in controversy exceeds the sum of $10,000.00, exclusive of costs and interest. This is an equitable suit authorized by 42 USC Sections 1983 and 1988, to redress deprivation under color of law of rights, privileges and immunities, secured by the Constitution of the United States.

PARTIES

2. Plaintiff, Catherine Jackson, is an adult individual, age 28, who presently resides at 531 Cleveland Avenue, York, York County, Pennsylvania.

3. Defendant, Metropolitan Edison, is a Pennsylvania Corporation, duly incorporated under the laws of Pennsylvania with registered office at Reading, Berks County, Pennsylvania, and with offices and place of business at Parkway Blvd., York, York County, Pennsylvania, and

is licensed to do business within the Commonwealth of Pennsylvania.

4. Defendant corporation is a public utility as defined by the Public Utility Law, Act of May 28, 1937, P.L. 1053, 66 P.S. Section 1102, is in the business of providing its customers with electrical service within the City and County of York, Pennsylvania, and is subject to the rules and regulations of the Pennsylvania Public Utility Commission and the Commonwealth of Pennsylvania.

GROUP ALLEGATION

5. Plaintiff brings this action on her own behalf and on behalf of all other persons similarly situated, pursuant to Rule 23A and B (2) of the Federal Rules of Civil Procedure. Said class of persons consists of all low income customers of Defendant whose electrical service has been or will be terminated by Defendant for alleged non-payment of bills for service furnished. There are common questions of fact and law regarding Defendant's unlawful termination of Plaintiff's electrical service, and of the resulting denial of due process of law to Plaintiff and to said class, without prior notice and hearing to determine liability for payment of outstanding bills. The members of this class are so numerous as to make it impracticable to bring them all before this Court. A common relief is sought. The Plaintiff adequately represents the interest of the class.

STATE ACTION

6. Defendant corporation is regulated by the Pennsylvania Public Utility Commission and is subject to the laws of the Commonwealth of Pennsylvania, and has a monopoly in the providing of electrical services within York, Pennsylvania and therefore state action has been applied through Defendant, in this case under the facts set forth, to the prejudice of Plaintiff and the class she represents.

RELIEF SOUGHT

7. This is a proceeding for:

a. Temporary restraining order, preliminary and permanent injunction requiring Defendant to restore Plaintiff's electrical service, and to prevent Defendant from terminating electrical service in the future for alleged non-payment of utility bills, prior to adequate notice and hearing concerning the alleged liability for payment thereof.

b. Declaratory judgement that Defendant's summary termination of Plaintiff's electrical services for alleged non-payment of utility bills, without notice and hearing, is unconstitutional.

FACTS OF THIS CASE

8. Defendant provided electrical service to Plaintiff at Plaintiff's address at 531 Cleveland Avenue, York, York County, Pennsylvania, and on October 11, 1971 terminated said utility service for Plaintiff's alleged non-payment of the utility bill in the approximate amount of ONE HUNDRED TEN DOLLARS ($110.00).

9. The billing party or person responsible for said bill, since on or about October, 1970, has been and is one James Dodson, a former co-occupant with Plaintiff, of the above premises.

10. Plaintiff has offered Defendant partial payments on account of said bill, but that Defendant has refused said tender, and in fact demands payment in full, prior to restoration of said utility service.

11. Plaintiff is presently without electrical service, is without the means to make payment in full, lacks the means to make payment in full, lacks the means to move from said premises, and is unable to secure substitute electrical service.

12. Plaintiff occupies the above premises with her two minor children, ages 10 and 12 respectively, and her sole source of income is a Public Assistance grant in the amount of ONE HUNDRED NINETEEN DOLLARS ($119.00) received every two weeks.

13. As a result of termination of electrical services, Plaintiff has incurred property damage, and has herself and her children suffered physical harm and mental anguish.

14. Plaintiff and her children will suffer irreperable harm unless said electrical service is restored, and accordingly, injunctive relief is necessary.

15. There does not exist an adequate remedy at law, and further that due to the crucial issue involved, there is no time in which to attempt to exhaust administrative remedy procedure by filing of a formal complaint with the Pennsylvania Public Utility Commission, the regulatory commission of Defendant.

16. Plaintiff has an adequate defense to her alleged liability of the utility bill.

17. Nowhere in the rules, regulations or statutes governing Defendant's operations are there provisions which establish any procedure affording Plaintiff and other class members a hearing to determine liability for utility bills or the validity of Defendant's reasons for discontinuance of services, prior to the termination of said services.

DENIAL OF RIGHTS

18. Defendant's termination of Plaintiff's electrical service without prior notice and hearing is unconstitutional and unlawful, in that:

a. Such action is a denial of Plaintiff's due process rights under the 14th Amendment of the U.S. Constitution, in that Plaintiff is afforded no notice or opportunity to be heard.

b. Such action is a denial of Plaintiff's rights under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, in that no remedy is provided them to contest such discontinuance of services by Defendant solely by reason of their poverty and in absence of any compelling state interest or other reasonable basis for such denial.

c. Such action deprives Plaintiff of a vital necessity of life, and hence deprives Plaintiff of the right to life

and property under the Ninth Amendment of the U.S. Constitution.

WHEREFORE, Plaintiff, on behalf of herself and on behalf of all other persons similarly situated, respectfully requests that this Court:

A. Take jurisdiction in this case.

B. Issue a temporary restraining order enjoining Defendant to forthwith restore Plaintiff's electrical service.

C. After hearing, issue a preliminary and permanent injunction enjoining Defendant from terminating electrical service of Plaintiff and the members of her class for alleged non-payment of utility bills, without prior notice and hearing on liability for payment of said bill.

D. Declare Defendant's summary termination of utility service unconstitutional, while acting under color of state law, in violation of rights afforded Plaintiff and the members of her class under the Due Process and Equal Protection Clauses of the 14th Amendment of the U.S. Constitution.

E. Award such damages as shall have been caused to Plaintiff and class members as the Court shall determine suffered because of Defendant's conduct.

F. Award such other relief as the Court may deem just and equitable in this matter.

Respectfully submitted,

/s/ Alan Linder
ALAN LINDER, Esquire

Dated: Oct. 18, 1971

/s/ Albert G. Barnes, Jr.
ALBERT G. BARNES, JR., Esquire
Attorneys for Plaintiff
Tri-County Legal Services
220 East King Street
York, Pennsylvania 17403
(717) 843-8938

COMMONWEALTH OF PENNSYIVANIA)
) ss:
COUNTY OF YORK)

Before me, the subscriber, a Notary Public in and for the said County and Commonwealth, appeared Catherine Jackson, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Complaint are true and correct to the best of her knowledge, information and belief.

/s/ Catherine Jackson
CATHERINE JACKSON

Sworn and subscribed to before me this 18th day of October, 1971.

/s/ Valerie G. Berta
VALERIE G. BERTA
Notary Public, York, York County
My Commission Expires January 20, 1975

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,
PLAINTIFF

—*vs*—

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,
DEFENDANT

TEMPORARY RESTRAINING ORDER

ORDER

AND NOW, TO WIT: this 18 day of Oct., 1971, upon motion of Alan Linder and Albert G. Barnes, Jr., Esquires, Attorneys for the Plaintiff above named:

This cause came to be heard on Plaintiff's complaint, and it appears that the Defendant is committing acts as set forth in Plaintiff's complaint and will continue to do so unless directed otherwise by order of this Court and that immediate and irreperable injury, loss, or damage will result to Plaintiff before notice can be given, and the Defendant and its attorney and interested opposing parties can be heard in opposition to the granting of a Temporary Restraining Order in that Plaintiff must immediately have restored her electrical services, which Defendant summarily discontinued without notice and hearing, it is

Ordered that Defendant, its agents, servants and employees are hereby enjoined from summarily terminating and discontinuing Plaintiff's electrical services, without prior notice and hearing, and Defendant is further enjoined and directed to restore Plaintiff's electrical services, and it is further

Ordered that this order will expire within 5 days after entry unless within such time the order for good cause is extended, or unless the Defendant consents that it may be extended for a longer period; and it is further

Ordered that the Plaintiff's motion for a preliminary injunction be set down for a hearing on the 22 day of Oct., 1971, at 10:00 A.M. o'clock at U.S. Court House, Post Office Bldg., Scranton, Pa., and it is further

Ordered that copies of this order and of Plaintiff's complaint submitted therewith, be immediately served upon the Defendant.

Issued at Scranton, Oct. 18, 1971.

BY THE COURT:

/s/ William J. Nealon
U. S. District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,
PLAINTIFF

—*vs*—

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,
DEFENDANT

AFFIDAVIT

Mr. Samuel B. Russell, Esq., Colonial Trust Building, Reading, Berks County, Pennsylvania 19601, phone #(215) 374-4895, Attorney for Defendant, was notified by Plaintiff's Attorney on October 18, 1971, at 10:00 A.M. that hearing argument regarding issuing of temporary restraining order would be held in the afternoon on October 18, 1971, before U.S. District Judge William Nealon, U.S. District Court, Scranton, Pennsylvania and informed Plaintiff's counsel by telephone that he would be unable to appear before the Court on said date.

/s/ Alan Linder
ALAN LINDER, Esquire
Attorney for Plaintiff

Sworn and subscribed to before me this ... day of ----------, 1971.

Notary Public

My Commission Expires:

October 20, 1972

Alan Linder, Esq.
Tri-County Legal Services
220 East King Street
York, Pa. 17413

To

EMILY R. CADDEN
Official Court Reporter
P. O. Box 63
Scranton, Pa. 18501

In re: Jackson v. Metropolitan Edison Co., USDC MD PA
Civil No. 71-453

To Transcript of Hearing before Judge William J. Nealon at Scranton, Pa., on Friday, October 22, 1971:

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 71-453

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated

v.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation

Transcript of Hearing held before HONORABLE WILLIAM J. NEALON, United States District Judge, sitting at Scranton, Pennsylvania, on Friday, October 22, 1971, commencing at 11:40 o'clock, A.M.

APPEARANCES:

For the Plaintiff:

ALAN LINDER, ESQ.
Tri-County Legal Services
220 East King Street
York, Pennsylvania 17413

For the Defendant:

RUSSELL J. O'MALLEY, ESQ.
Miller Building
Scranton, Pa. 18503
and
RYAN, RUSSELL & McCONAGLEY
Colonial Trust Building
Reading, Pennsylvania 19601
By: SAMUEL B. RUSSELL, ESQ.

Reported by:

EMILY R. CADDEN
Official Court Reporter
Scranton, Penna. 18501

INDEX TO WITNESSES

INDEX TO EXHIBITS

[3] (Court opens at 11:40 A.M.—Litigants and all counsel present.)

THE COURT: Gentlemen?

MR. O'MALLEY: If the Court please, for the purposes of this case I would like to move the admission of Mr. Samuel B. Russell, who is admitted to practice in the District Court of the United States for the Eastern District of Pennsylvania, and also the Supreme Court of Pennsylvania.

THE COURT: So ordered. Glad to have you, Mr. Russell.

MR. RUSSELL: Thank you, Your Honor.

THE COURT: Gentlemen?

MR. RUSSELL: If the Court please, the parties are prepared to stipulate certain documentary evidence, and if the Court has no objection, we would propose to have the evidence consecutively as exhibits without identification as to which party has submitted them.

THE COURT: All right. Suppose we make them Court Exhibits.

MR. RUSSELL: All right. As Court Exhibit No. 1, we have a certified copy of a deed dated March 21, 1969, from a Dorothy B. Marshall to Catherine M. Jackson, who is the plaintiff in this case.

MR. LINDER: That's correct.

(Court Exhibit No. 1 marked for identification.)

[4] MR. RUSSELL: As Court Exhibit No. 2, we have a certified copy of a mortgage given by Catherine M. Jackson, the plaintiff in this proceedings, to National Bank and Trust Company of Central Pennsylvania with respect to the premises which is the subject of Court Exhibit No. 1.

THE COURT: What is the date of that?

MR. RUSSELL: I'm sorry. The date is—

THE COURT: March 21, 1969?

MR. RUSSELL: (Continuing)—March 21, 1969.

(Court Exhibit No. 2 marked for identification.)

MR. RUSSELL: As Court Exhibit No. 3, we have a photograph showing the premises which are in part the

subject of the deed, which is Court Exhibit No. 1. The particular residence in question is the property shown in the right center bottom of this photograph and to the left of a tree appearing at the right of the photograph, and the house in question is marked with an "X".

(Court Exhibit No. 3 marked for identification.)

MR. RUSSELL: As Court Exhibit No. 4, we have a photograph of a portion of the wall of the right side of the premises, which is the subject of Court Exhibit No. 1, as those premises appear on Court Exhibit No. 3. On this exhibit appears the electrical wiring bringing service to the subject premises, an electric meter affixed to the wall and other wires leading into the subject premises.

(Court Exhibit No. 4 marked for identification.)

[5] MR. RUSSELL: As Court Exhibit No. 5, we have a further photograph showing a portion of the same wall appearing in Court Exhibit No. 4. It is in effect a close-up of the meter area shown in Court Exhibit No. 4.

(Court Exhibit No. 5 marked for identification.)

MR. RUSSELL: Now, I state to the Court that the parties stipulate that so far as Court Exhibits 3, 4 and 5 are concerned, they accurately portray the condition of the subject premises of the plaintiff as of October 11, 1971, and it is further stipulated with respect to those same three exhibits that the meter—I'm sorry—with respect to the latter two of those exhibits, Court Exhibits 4 and 5, that the meter shown in such photographs was not the meter that was in place at this location at the time service, electric service, to the subject premises was disconnected by defendant in September of 1970. It was a new meter.

MR. LINDER: Right.

MR. RUSSELL: If the Court wishes, we can bring specifically to the attention—Oh, I'm sorry. Strike that.

As Court Exhibit No. 6, we offer various sheets and supplements constituting Defendant's Tariff No. 40, Electric Tariff No. 40, showing the provisions of such tariff

as they were in effect during the period of January 1, 1970, to and including June 29, 1971.

(Court Exhibit No. 6 marked for identification.)

[6] MR. RUSSELL: As Court Exhibit No. 7, we have Defendant's Electric Tariff No. 41, showing the provisions of such tariff as they have been in effect on and since June 30, 1971.

THE COURT: That's from June 30, '71, to date?

MR. RUSSELL: Yes.

(Court Exhibit No. 7 marked for identification.)

MR. RUSSELL: Now, if the Court wishes, we could bring specifically to the attention of the Court several provisions in Court Exhibits 6 and 7, which bear on the issues raised in this proceeding. We direct the Court's attention to the general rules and regulations appearing in the front of these last two Court Exhibits 6 and 7, specifically Rule 15 having to do with causes for disconnection of service.

THE COURT: Rule 15?

MR. RUSSELL: Right. Rule 28 having to do with beginning and ending of service, and Rule 14 having to do with tampering with company equipment, and Rule 12 having to do with responsibility for damages to customers or company's equipment. I believe that covers the area of stipulation.

THE COURT: So agreed and Court Exhibits 1 through 7, inclusive, are received into evidence.

Mr. Linder?

MR. LINDER: Your Honor, does the Court wish [7] an opening statement on plaintiff's behalf or do you prefer—

THE COURT: You may waive it if you desire. Whatever you want to do. It's up to you.

MR. LINDER: Your Honor, I would like to make an opening statement to the effect that the Court is aware this is a hearing for preliminary injunction to sustain the temporary restraining order which was issued in this case on October 18th. In that regard, I would like to—through our witnesses we would like to acquaint

the Court with the background of the case by termination of plaintiff's electrical service by defendant, and it is our contention that it's an unlawful termination of service, and we would like to put the plaintiff on—the name plaintiff on the stand with regard to the facts surrounding the discontinuance of service.

THE COURT: Surely.

MR. LINDER: Thank you.

CATHERINE M. JACKSON,

Plaintiff, called and sworn in her own behalf, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LINDER:

Q Mrs. Jackson, where do you reside, please?

A Beg your pardon?

Q Where do you live?

A 531 Cleveland Avenue, York.

[8] Q Are you the plaintiff in this case?

A Yes.

Q How long have you lived at 531 Cleveland Avenue?

A About two and a half years.

Q Do you own the home?

A Yes.

Q And there is a mortgage on the home?

A Yes.

Q Now, has electrical service been provided to your home by Metropolitan Edison Company?

A Yes, it has.

Q How long has that service been in effect?

A What do you mean how long it's been in effect?

Q How long have you had electricity furnished by Metropolitan Edison Company?

A Ever since I've been in there.

Q And that would be since March of '69?

A Yes.

Q Who occupies that house with you? Who lives in that house?

A Now?

Q And since you moved in.

A When I moved in there was James Dodson that was living in there, and—

THE COURT: Was he living there before you moved in?

[9] THE WITNESS: No.

THE COURT: He moved in with you, is that it?

THE WITNESS: Right. (Continuing)—and my two children.

BY MR. LINDER:

Q How old are the children?

A My son is twelve and my daughter is ten.

Q Does Mr. Dodson still live in that house?

A No, he does not.

Q When did he leave?

A August of this year.

Q August?

A Yes.

Q Would you tell us what happened in regard to your electricity service last year in September, 1970?

A In September of 1970, on September the 22nd, the electric was disconnected in my name. I went out to make a phone call to the Electric Company. When I got back, the electric was back on, so I didn't say anything and then—

Q Are you saying that the electricity was turned off on the 22nd of September and turned back on on the 22nd of September?

A Right.

Q Were the bills at that time—Whose name were the bills in at that time?

[10] A Before September, they were in my name. After September they started coming in James Dodson's name.

Q Do you have any explanation for that?

A No, I do not.

THE COURT: Now, you said they were turned back on the same day after you made a phone call?

THE WITNESS: Yes.

THE COURT: In other words, you had talked to someone at the Electric Company, is that it?

THE WITNESS: Yes, I did.

THE COURT: What was your conversation?

THE WITNESS: I asked them how come the thing was disconnected and they said because of non-payment of bill, but I had been out there and made a payment on the electric bill and told them I couldn't make another one until the first of the month, and the guy said, "Okay."

THE COURT: And you said you'd make a payment the first of the month?

THE WITNESS: Right.

THE COURT: All right. Go ahead.

BY MR. LINDER:

Q When the bills came, did the bills—Whose name did the bills then come in?

A After September?

Q After September.

[11] A They was coming in James Dodson's name.

Q And he was living there at that time?

A Yes, he was.

Q Do you know what he did with those bills?

A No, I do not.

Q Do you know whether the electric bills wer paid or not?

A No, I do not.

Q Did anyone ever inform you that they had not been paid?

A I wasn't informed of this until the Wednesday before Mr. Eberly came to the house.

Q When is this that you're referring to?

A It was a week ago. The week before last on Tuesday. Well, he came that Thursday and the one guy came on the Wednesday and asked for James Dodson and I said that he wasn't there; that he didn't live there any more, and then on Thursday, Mr. Eberly came out and was talking to me.

Q Was that the beginning of October of this year?

A It was the week before last.

Q Would it be on or about October the 6th?

A Somewhere around there, yes.

Q All right. Now, someone came out to your house?

A Yes.

Q From Metropolitan Edison?

[12] A Yes.

Q Do you know his name?

A No. He just rang the front door bell and asked for James Dodson, and I told him he didn't live there any more.

Q What day of the week was that?

A That was on a Tuesday.

Q All right. And then—

A Tuesday or Wednesday.

Q All right. What happened then?

A Then that Thursday Mr. Eberly came out.

Q From?

A From the Metropolitan Edison, the electric company, and he was out back looking at—Well, the dogs was in the yard and he couldn't get in, and he asked did they bite and I said no, so he went in and he was reading the meter. So he was asking me about the meter and I told him, and he told me that somebody crossed some kind of line, and I said I didn't know anything about that and I didn't mess with it, and he said that he would have to go back to the company and find out just what was going on and just what was what, and I said, "Okay," and he told me to have $30.00 by Monday.

Q This was on Thursday?

A Yes.

Q All right. Go ahead.

A And I told him okay, and he said he would be back [13] Monday morning to talk to me about it, and when Monday came he didn't show. At 9:00 o'clock Monday morning, I started out the door to call and find out just what was going on, and that's when the lines out there was disconnected, and the man, which one it was, came over and said, "We have notice to disconnect the electric," and I says, "Well, how much is the bill," and he said, "We don't know," and he shut the thing off. So I went and called the electric company for him and he was out until 6:30, and he left word with the office for me to call him at his home.

Q This is whom now?

A Mr. Donald Ebersly. So when I called his home, I asked him about the thing and he said that it's out of his hand, and Mr. Bentley has to connect it.

Q Did you talk to Mr. Bentley?

A No, I did not.

Q Did you ever receive notice from Metropolitan Edison that your electrical service was going to be terminated?

A No.

Q We're speaking with regard to the termination—When did that termination occur? Do you know the date?

A What date when?

Q When your service was shut off?

A It was shut off on the 11th, Monday, I think.

Q Did you ever receive notice that that service was going to be turned off?

[14] A No, I did not.

Q Were you ever told orally that it was going to be shut off?

A No.

Q You received no written notice?

A No.

Q You mentioned prior that someone had come out to read the meter. I'm interested in whether had anyone come out to read the meter since the last time your electrical service was terminated in 1970?

A They were out there every month reading the meter.

Q How often?

A What is it, once a month or every other month and reads the meter. There's always a guy in the yard out there reading the meter. When they came in to read the meter, I never stopped them from going and read the meter.

Q You've seen them come into your yard—

A Yes, I have.

Q (Continuing)—and read the meter?

A Yes.

Q This would be between September of '70 and October of this year?

A Yes, it was.

Q When was the first time—You said when Mr. Eberly or one of the gentlemen from Metropolitan Edi-

son came out to [15] your house and informed you that someone had, quote, "tampered or crossed the lines"?

A Yes.

Q Was that the first time you had ever been informed of that?

A Yes.

Q Did you have any knowledge that that occurred?

A No, I did not.

Q Did you have anything to do whatsoever with any crossing of the line?

A No, I did not.

Q Did anyone ever tell you at any time that they had tampered with the meter or crossed the lines?

A No.

Q Did Mr. Dodson ever tell you that he had not paid the electric bill?

A No, he didn't.

MR. LINDER: You may cross examine.

MR. RUSSELL: May I have just a second?

(Brief off-the-record interval.)

MR. LINDER: With the Court's permission, I have one further question.

BY MR. LINDER:

Q You stated that the service was turned off October 11th. How long was it off?

[16] A It was off until Tuesday of this week.

Q That will be approximately eight days?

A Yes.

Q How is your house heated?

A I had to use the oven to heat it because the oil I use has an electric switch to it and cuts on and off automatically, and I had to use the oven to heat with downstairs.

Q Was anyone affected by the lack of heat or by the termination of the service?

A My children got cold and I had to take both of them to the doctor.

Q Did you have any lighting in the house?

A I didn't have any lighting, no heat and no hot water.

MR. LINDER:Thank you.

CROSS EXAMINATION

BY MR RUSSELL:

Q Mrs. Jackson, you've indicated that one James Dodson moved into your house at the time you moved in and continued to reside there continuously until August of 1971. Is that correct?

A Yes.

Q What was his status? Did he have a lease of a portion of the premises?

A We used to go together.

[17] Q He was not a tenant in the property?

A Well, after we broke up, he was—I let him stay on there until I got tired of him and then I just told him he had to leave.

Q Did he at any time during the period of his residence in your home have any interest in the property at 531 Cleveland Avenue in York?

A What do you mean by interest?

Q Did you convey or transfer any interest in the property to him?

A What do you mean interest in the property?

Q He was not a tenant, and you didn't convey to him any interest in the real estate? He was no owner of the real estate or any part of it? Is that right?

A I don't understand what you're trying to say.

THE COURT: He wasn't a part owner?

BY MR. RUSSELL:

Q He was not a part owner of the property, was he?

A No.

Q And he was not a tenant?

A Not really.

Q And this is correct, is it not, that you have had the use of electric energy in your home from September 22nd, 1970, through until the morning of October 11th, 1971?

A Repeat your question?

[18] MR. RUSSELL: Will you repeat the question, please?

(Court Reporter reads last question.)

THE WITNESS: Yes.

BY MR. RUSSELL:

Q And was that electric energy which you so used from the wires of the Metropolitan Edison Company?

A Yes.

Q And during the period of September 22nd, 1970, through October 11th, 1971, did you pay any electric bills with respect to the electric energy so consumed in your home?

A No.

Q Mrs. Jackson, did you not state to one or more representatives of Metropolitan Edison Company that James Dodson rehooked up the electric service to your home after Metropolitan Edison Company disconnected that service at the meter on September 22nd, 1970?

A No, I did not.

Q Did you not state to Mr. Donald Eberly, a customers' representative of Metropolitan Edison Company, on October 7th, 1971, when he visited your home, as you have testified, that electric service to your house should be put in the name of a Robert Jackson?

A Yes, I did this.

Q You did say that to him?

[19] A Yes.

Q And who is Robert Jackson?

A My son.

Q Pardon?

A My son.

Q That's your twelve year old son?

A Yes.

Q Isn't it a fact, Mrs. Jackson, that you told Mr. Eberly—

THE COURT: Is it Eberly?

MR. RUSSELL: His name is Eberly. I think she uses a slightly different name, but—

THE COURT: E-b-e-r—

MR. RUSSELL: E-b-e-r-l-y.
THE COURT: All right.

BY MR. RUSSELL:

Q (Continuing)—to put electric service for your home in the name of one Robert Jackson in order to conceal from Metropolitan Edison Company the fact that you were one and the same Catherine Jackson whose electric service at this subject premises, your home, had been disconnected by that company on September 22nd, 1970?

A I didn't do it to conceal anything.

Q Will you tell the Court why you told Mr. Eberly to enter electric service at your home in the name of your twelve year old son?

[20] A I said to put it in his name to give me time to get the rest of the money to pay it when the old bill that I had owed. This is the only reason I did it, but I wasn't concealing anything.

Q Isn't it a fact, Mrs. Jackson, that on the morning of October 11th, 1971, when the Metropolitan Edison Company employee met you at your home and told you that he was about to disconnect the electric service at the pole that he told you that disconnection was being made because of non-payment of bills and tampering with the company's meter?

A No, he did not tell me this. What he said was that the electric was being disconnected at the pole for non-payment of bill. That was all he said.

MR. RUSSELL: If the Court please, that's all the cross examination that we would have for Mrs. Jackson at this time.

THE COURT: Mrs. Jackson, was Mr. Dodson employed when he lived with you?

THE WITNESS: Yes, he was working at AMF, American Machine and Foundry at York as a machinist.

THE COURT: And are you telling me that on September 22nd, 1970, when the electricity was disconnected that you went to use the phone somewhere, is that it, to inquire?

THE WITNESS: At my sister's house, yes.

[21] THE COURT: And by the time you got back the service had been reinstated?

THE WITNESS: Right.

THE COURT: And are you telling me that you assumed someone from the electric company came and reinstated the service?

THE WITNESS: Yes.

THE COURT: How long were you away from the house at that time?

THE WITNESS: About forty-five minutes, because my sister lived two blocks away from me.

THE COURT: Now, up until that time had the bills come in your name?

THE WITNESS: Up until that time, yes.

THE COURT: And how did they come after that?

THE WITNESS: They came in James Dodson's name.

THE COURT: How did that happen?

THE WITNESS: I don't know.

THE COURT: You had no idea? Did you have any discussion with Mr. Dodson about this?

THE WITNESS: Yes, I did. I asked him how come he received the electric bills in his name and he said he didn't know, and I didn't say anything else to him about it.

THE COURT: Were you assuming that he was paying them?

[22] THE WITNESS: I was assuming that he was, yes, then they came in his name.

THE COURT: But prior to that time you paid them, is that it?

THE WITNESS: Yes.

THE COURT: And then they were turned off—the electricity was disconnected and then reinstated and you never paid it again?

THE WITNESS: No.

THE COURT: And you assumed he was paying it?

THE WITNESS: Yes.

THE COURT: Yet he didn't tell you he was going to pay it or—

THE WITNESS: He didn't tell me he did and he didn't tell me he didn't.

THE COURT: Well, what made you assume that he was going to pay it? Didn't you have any discussion about this?

THE WITNESS: Well, at the time that the first bill came in the bill was in his name and I gave the bill to him, you know, and when I asked him why the things were coming in his name, he said he didn't know, and I said, "You better take the thing out there and pay it," and he said, "Yeah, I'll pay it," like that.

THE COURT: He told you he would pay it?

[23] THE WITNESS: Yes, he did.

THE COURT: All right. That's all I have.

RE-DIRECT EXAMINATION

BY MR. LINDER:

Q When Mr. Dodson lived there, did he help pay any other bills or expenses?

A Yes, he gave money to pay some of the bills. Yes, he did.

Q So he lived there and he helped take care of the maintenance?

A Yes.

Q The maintenance of the house, too?

A Yes.

MR. LINDER: Thank you.

MR. RUSSELL: I have one further question.

RE-CROSS EXAMINATION

BY MR. RUSSELL:

Q You said, Mrs. Jackson, that James Dodson moved out of your home in August of 1971?

A Yes.

Q Did you pay any bills for electric service between August of 1971 and October, 1971?

A No.

MR. RUSSELL: That's all at this time.

THE COURT: Did the bills continue to come in his name.

[24] THE WITNESS: There wasn't no bill that come in there between August and October. There wasn't an electric bill that came in at all.

THE COURT: All right. That's all I have.

MR. LINDER: Thank you, Mrs. Jackson.

(Witness leaves the witness stand.)

MR. LINDER: Your Honor, we have no further witnesses.

THE COURT: You rest?

MR. LINDER: Yes, we rest at this time.

THE COURT: All right. Do you have anything?

MR. RUSSELL: May we have just a moment?

(Brief off-the-record interval.)

MR. O'MALLEY: May we approach the bench?

THE COURT: Surely.

(At sidebar)

MR. O'MALLEY: In conformity with our discussions at the pre-trial session, we would like the opportunity, Your Honor, to present our defense at a later date. Meanwhile, it is our intention to file a motion to dismiss for failure to state a cause of action. The plaintiff has indicated that his entire case has been presented. We believe the plaintiff has not met his burden, and we would like an opportunity to present [25] to Your Honor a brief in answer to the brief submitted by plaintiff's counsel, and then to argue the motion to dismiss without prejudice to our right to present our defense at a later date.

THE COURT: How much time do you want?

MR. O'MALLEY: Well, whatever appears a reasonable time. I should think a few weeks.

THE COURT: It's all right so long as we're going to have an understanding that the service will not be disconnected.

MR. RUSSELL: The defendant would stipulate that the temporary restraining order if need be be continued

until some further date providing the opportunity to take the steps Mr. O'Malley has indicated.

THE COURT: All right. How much—Do you want fifteen days to get your motion and brief prepared and submitted? Is that enough time?

MR. O'MALLEY: Well, time has a way of speeding by. Instead of fifteen days, may I suggest three weeks?

THE COURT: Sure. You have no objection to that, do you?

MR. LINDER: I have no objection except that we did ours in a shorter time than that.

THE COURT: Let me ask you this: Did you really do yours since Tuesday or Monday?

[26] MR. LINDER: Yes.

THE COURT: You had no—you typed out all of that—

MR. LINDER: We had a couple law students, who work parttime in our office, and myself and we researched for about forty-eight straight hours and we wrote it the third day and typed it the fourth day.

THE COURT: Well, you did a good job.

MR. O'MALLEY: I haven't read it yet, but it looks good from what I've seen of it.

THE COURT: I mean it's well documented and well researched. I'm not saying how persuasive it is, but the form. All right. We'll give twenty-one days then, and upon its being filed I would ask counsel to inform me promptly if they desire oral argument or want to submit it on the briefs.

MR. LINDER: I have a question procedural wise. They indicated they're going to file a motion to dismiss. Will that be argued at the same time as oral arguments on briefs in support of the preliminary injunction or—

THE COURT: Well, we'll have to dispose of the motion to dismiss first, because it will be, as I anticipated, on jurisdiction grounds, and if the Court concludes that we do have jurisdiction, then defendant wants the opportunity to present evidence on the merits, and so that they will be argued, if they're argued, separately.

[27] MR. LINDER: I see. I assume then that we'll just be using the same—substantially the same arguments and the same brief.

THE COURT: Yes.

MR. LINDER: Would we be required to file another brief?

THE COURT: No, unless after you receive their brief you want to file a reply brief, you must ask me and I'll consider it at that time.

MR. LINDER: Okay.

THE COURT: In chambers I mentioned the state action problem. I don't mean to limit it to that, of course, but it's up to you, but that is something I would like to do a little more on myself. Okay?

MR. LINDER: So then our office will be notified of—

THE COURT: At the end of twenty-one days when you—you've give him a copy of your brief, and when you get a copy of their brief, if you desire to file a reply brief, you should contact me by phone immediately.

MR. LINDER: Okay.

THE COURT: If you don't, and the defendant has not requested oral argument and you don't desire oral argument, then I'll just take it under advisement with the submission of briefs. If you desire oral arguments, so inform me and we'll set a time down for that.

[28] MR. LINDER: That will be first, and then the motion to dismiss is denied, and then we'll have arguments on the preliminary injunction, and then we'll have testimony by the defendants.

THE COURT: Well, no, we'll have testimony by the defendants if we get beyond the motion.

MR. O'MALLEY: This is what I intended. If you grant our motion, of course, then there's no need for taking the time for the testimony, and contrary, if you rule against us on the motion to dismiss, then we'll present our testimony and then argue whether or not you're entitled to a preliminary injunction.

THE COURT: Right.

MR. LINDER: Fine.

THE COURT: All right. Thank you, Gentlemen.

(End of sidebar)

(Whereupon, Court adjourned at 12:30 P.M.)

CERTIFICATE

I HEREBY CERTIFY that the proceedings and evidence are contained fully and accurately in the stenographic notes taken by me during the foregoing hearing, and that this is a true and correct transcript thereof.

/s/ Emily R. Codden
Official Court Reporter

COURT EXHIBIT No. 7

71-453 Civil

Electric Pa. P.U.C. No. 41
Cancelling
Electric Pa. P.U.C. No. 40

METROPOLITAN EDISON COMPANY
READING, PENNSYLVANIA

ELECTRIC SERVICE TARIFF

Effective in

The territory as defined on
Page No. 5 of this tariff.

Issued April 30, 1971 Effective June 30, 1971

FREDERIC COX, President
Reading, Pa.

NOTICE

This Tariff Makes Increases and Changes
In Existing Rates

GENERAL RULES AND REGULATIONS
THE ELECTRIC SERVICE TARIFF

FILING AND POSTING: A copy of the tariff, comprising the Rates and Rules and Regulations governing the supply of electric service, is filed with the Pennsylvania Public Utility Commission and is posted and open to inspection of the offices of Company.

APPLICATION: Rates of the tariff apply only to Company's Standard Service, namely, alternating current of sixty cycle frequency at designated standard nominal voltages and delivered from overhead supply lines except in certain restricted areas where Company on the basis of customer or load density elects to provide an underground network system of distribution and except where other underground facilities are installed as provided in Rule (23) and/or Rule (32) of Company's General Rules and Regulations.

GENERAL: These Rules and Regulations, filed as a part of the Tariff of Company, set forth the conditions under which service is rendered and govern all classes of service to the extent applicable, unless specifically modified in a particular service classification or written in and made a part of a contract for service.

(1)—*Contract:*

A written application is requested from each Customer, which when accepted by a duly authorized representative of Company, shall constitute the contract between Customer and Company, and no agent has power to modify, alter or waive any of its conditions. Such application, when accepted, shall bind and inure to the benefit of the heirs, executors, administrators, successors or assigns, as the case may be, of the respective parties thereto, but neither Customer nor Customer's assigns shall assign any rights thereunder without the written consent of Company.

Forms of the application, together with the rules and regulations and schedule of rates, will be furnshed upon

application at Company's office. Customer shall, at the time of making application for service, state the conditions under which service will be required and Company shall designate the service classification or classifications applicable to such service. Where more than one service classification applies, Customer shall select the service classification to be applied to his service, and Company will assist Customer after notice of service conditions, in determining which service classification to select, but the responsibility of making the selection shall at all times rest with Customer.

In the event a written application for service has not been made by Customer, service furnished by Company shall nevertheless be rendered in accordance with all the terms and conditions of the applicable service classification. The applicable service classification in a case where more than one service classification might apply, and Customer has failed to make a selection, shall be that service classification which in Company's judgment at the time service is requested, based upon the facts at hand, is most advantageous to Customer.

(2)—*Deposit and guarantee:*

Where an applicant's credit is not established, or where the credit of a Customer with Company has become impaired, or where Company deems it necessary, a deposit or other guarantee satisfactory to Company, may be required as security for the payment of future and final bills, before Company will commence or continue to render service.

Deposits may be required from Customers taking service for a period of less than thirty days, in an amount equal to the estimated gross bill for such temporary period. Deposits may be required from all other Customers, provided that, in no instance, may deposits be required in excess of the estimated gross bill for any single billing period plus one month (the maximum period not to exceed four months) with a minimum of $5.00.

Deposits shall be returned to the domestic Customer when such Customer shall have paid undisputed bills for services over a period of twelve consecutive months. Any

Customer having secured the return of a deposit shall not be required to make a new deposit unless the service has been discontinued or Customer's credit standing impaired through failure to comply with tariff provisions.

All deposits shall bear simple interest at the rate of six percent per annum, payable annually.

On discontinuance of service and payment in full of all service charges and guarantees, Company will refund deposit, or will deduct such unpaid accounts from the deposit and refund the difference, if any. Deposit shall cease to bear interest upon discontinuance of service.

(3)—*Customer's wiring:*

Customer shall communicate with Company, preferably in writing, giving the exact location of the premises to be served. Upon receipt of such information, Company will designate a point of delivery at which all service connections will terminate and near which Customer must provide, free of expense to Company, a suitable place, satisfactory to Company, for the transformer or transformers, meter or meters, or other equipment of Company, which may be necessay for the fulfillment of such contracts as Customer may enter into with Company.

The wiring of Customer's premises for connection to overhead secondary lines must be brought outside of the building wall at a location designated or approved by Company in such a manner that it will be easily accessible for the attachment of Company's wires. Customers desiring an underground secondary service from overhead lines must bear the excess cost thereof, or the full cost thereof, where so provided in Rule (23) hereof, and any such installations made shall be in accord with Rule (23). Construction for service at primary voltage and point of connection will be specified by Company.

When necessary, in the opinion of Company, Customer shall furnish a fireproof structure at a location and of a size and type satisfactory to Company for meters, transformers and other apparatus necessary for supplying service.

There shall be no obligation on the part of Company either to connect or remain connected with any Customer's

wiring or facilities when the installation or maintenance thereof is not in accordance with the provisions of the National Electrical Code and Company's requirements or when the certificate of compliance with the regulations of the National Board of Fire Underwriters, has not been issued by the Middle Department Association of Fire Underwriters or the municipal inspection bureau or by any competent inspection agency.

(4)—*Service installations:*

Service installations shall be in accordance with the National Electrical Code, except as modified by the Company's booklet entitled "Requirements for Service and Meter Installations," and by the following:

Entrance conduits, where used, shall be ¾ inch or larger and shall extend at least 15 feet above the ground line wherever practicable. Entrance conduit inside a building shall be one continuous run to the entrance switch or meter mounting. Approved weather-proofed armored service capable may be used in place of rigid conduit.

Conductors shall extend at least 2 feet outside the service head. The grounded conductor shall be identified by a white braid covering or other approved means of identification.

Company will make all service connections to Company's lines.

All service wiring and conduit on Customer's side of the point of delivery shall be installed by and at the expense of Customer.

In the event that Company shall be required by any public authority to place underground any portion of its mains, wires or services, or relocate any poles or feeders, Customer, at Customer's own expense, shall change the location of Customer's point of delivery to a point readily accessible from the new location as specified by Company.

(5)—*Meter installations:*

Company will install one meter for each type of service as determined by voltage and phase. In general, lighting meters will be located either at a point on the outside of the building where they can be protected from the elemnts, in a manner approved by Company, or they will be located in the basement, as near as practicable to the service entrance. The location selected shall be accessible at all times to both Customer and Company and shall be clean, dry, and free from vibration. In all cases the meter box or cabinet shall be so placed that the meter can be installed five feet from the floor or ground line, unless otherwise specifically authorized by Company. Meters located indoors shall be installed on a meter board, constructed of 7/8 inch clear soft pine or similar wood, painted, and securely fastened to foundation walls with an air space between wall and board.

All meter wiring and conduits shall be installed by and at the expense of Customer.

Where it is desired to place meters on Customer's switchboards, Company will furnish plans for such installation.

Where more than six meters are grouped in one installation, a separate main entrance switch is required. For meter groups less than six, the number of circuits may be such that a main entrance switch is required in order to comply with National Electrical Code.

(6)—*Grounding:*

All single phase services shall be grounded when the potential to ground does not exceed 150 volts. All 3 phase, 4 wire services shall have the neutral grounded. In addition to service grounding, interior wiring shall be grounded as provided by the National Electrical Code.

(7)—*Customer's equipment:*

Customer shall pay the original cost and maintenance of any special installation necessary to meet his particular requirements for service at other than Company's standard voltages and phase, or for the supply of closer

voltage regulation than furnished under Company's standard practice.

Motors rated 1 HP or smaller will be served single phase at either 120 or 240 volts, provided, however, that motors with locked rotor current in excess of 50 amperes must be connected for 240 volts service. Motors rated above 1 HP and not exceeding 5 HP will be served single phase at 240 volts. For motors rated above 5 HP and installations of several small motors aggregating 5 HP or more, information as to the character of service and availability will be furnished on application.

Company will not be responsible for the voltage regulation of service for mixed light and power in installations to a greater extent than required for power installations.

Motors frequently started or motors arranged for automatic control shall be of a type to give maximum starting torque with minimum current, and shall be equipped with controlling devices approved by Company. Customer shall install, at Customer's expense, a reverse-phase relay of approved type on every alternating current motor used for passenger or freight elevators, hoists, pumps or cranes.

Customer shall install in connection with any fluorescent or neon lighting or other lighting or display facilities having similar load characteristics, auxiliary equipment desgned to correct the power factor of such installations to not less than 85%. When the power factor of such installation is, upon test, found to be less than 85%, the use of capacity for billing shall be corrected to 85% power factor.

(8)—*Service and meter installations:*

For information in addition to Rules 3 to 7, inclusive, a booklet entitled "Requirements for Service and Meter Installations" has been prepared for use of architects, contractors, builders, electricians and other interested parties, setting forth methods of electrical installation and construction approved by Company for use in its system. Changes and revisions therein may be made at any time and will be effective upon issue. Copies may be

obtained free upon request addressed to any office of Company.

(9)—*Changes in Customer's wiring and connected load:*

The service connection, transformers, meters and equipment, supplied by Company for the requirement of each Customer, have a definite capacity for this reason Company shall be notified by Customer in writing before any change is made in the load characteristics of Customers' connected load. Customer shall give advance written notice to Company of any proposed increase or decrease in, or change of purpose or of location of, his installation. Failure to give such notice shall render Customer liable for any damage to the meters or their auxiliary apparatus or the transformers or wires of Company, caused by the additional or changed installation.

Where service is supplied under service classifications which base the use of capacity or minimum charge upon Customer's connected load, Customer shall notify Company from time to time of changes in the connected load or service conditions. Company shall have the right at any reasonable time to make an inspection of Customer's installation for the purpose of ascertaining whether or not there have been changes in the connected load or service conditions. The use of capacity or minimum charge, as the case may be, shall thereafter be based upon the changed conditions.

(10)—*Single delivery location:*

The service classifications are based on the rendering of service through a single delivery and metering point. Service rendered to the same Customer at other points of delivery shall be metered and billed separately as provided for.

(11) —*Access to Customer's premises:*

Company's properly identified employees shall have access to the premises of Customer, at all reasonable times, for the purpose of reading meters, testing or inspecting Customer's connected load, repairing, removing or ex-

changing any or all equipment belonging to Company, and for the purpose of removing its property on the termination of its contract or on the discontinuance of service from whatever cause.

(12)—*Responsibility for damage to Customer's or Company's equipment:*

Company will not be responsible for any damages done to or injury sustained by Customer on account of the condition or character of Customer's wiring and equipment, or the wiring and equipment of others on Consumer's premises. Company will not be responsible for the use, care or handling of the electricity delivered to Consumer after the same passes from Company's wires to Consumer's wires, or through the divisional switch separating Consumer's wires and equipment from Company's wires and equipment.

Consumer shall be responsible and pay for damages to Company's equipment on Consumer's premises, except for damage caused thereto by Company or Company agents.

(13)—*Continuity of service:*

Company will use reasonable diligence to provide continuous, regular and uninterrupted service; but Company may interrupt service to any Customer or Customers for the protection of life or property, for making repairs, changes, or improvements in any part of its system for the general good of the service or safety of the public, or when in Company's sole judgment such interruption will prevent or alleviate an emergency threatening the integrity of its system, or will aid in the restoration of service. Should service be interrupted for any of the above reasons, or should service fail by reason of any accident, strike, legal process, governmental interference, or any cause whatsoever beyond its control, the Company shall not be liable for damages, direct or consequential, resulting therefrom.

(14)—*Tampering with Company's equipment:*

In the event evidence is found that Company's meters or other property on Customer's premises are tampered or interfered with, resulting in improper or nonregistration of sevice supplied, the Customer being supplied through such equipment shall pay an amount which Company may estimate is due for service used but not registered on Company's meter, and the cost of any repairs or replacements, and inspections and investigations required. Customer shall, in such case, at Customer's expense, upon notice by Company, make such changes in the service and meter wiring or location as Company may require.

(15)—*Cause for discontinuance of service:*

Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of nonpayment of bill or violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; or, without notice, for abuse, fraud or tampering with the connections, meters or other equipment of Company. Failure by Company to exercise this right shall not be deemed a waiver thereof.

Should Company's service be terminated for any cause aforesaid, the minimum charge for the unexpired portion of the term shall become due and payable immediately, provided, however, that if satisfactory arrangements are subsequently made by Customer for reconnection of the service (in which event a reconnection charge of not less than $1.00 must be paid) the immediate payment of the minimum charge for the unexpired portion of the contract term may be waived or modified as the circumstances indicate would be just and reasonable.

Company may refuse its service to, or remove its service from, any installation which, in the judgment of Company, will injuriously affect the operation of Company's system or its service to other Customers.

(15-a)—*Service during forced suspension of operations:*

In the event that a Customer's plant is shut down on account of fire, flood, accident or act of God, or because

of a strike or lockout, causing a forced temporary cessation of a portion or all of a Customer's operation, the contract, upon written request of Customer will be suspended during the period of such cessation and the term of the contract will be automatically extended for a corresponding period. Billings during the suspension will be on the basis of demands and energy supplied during the period, applying the rates and minimum charges of the applicable rate schedule most advantageous to the Customer. Minimum demand blocks of a rate schedule, or minimum hours' use specified in a rate schedule may not be waived when such rate is applied during such temporary periods of suspension. If the billing periods during the suspension are less than a full month, bills will be prorated.

(16)—*Use of other electric service:*

Service is available when used by Customer in conjunction with Customer's private generating plant or other sources of supply, but only under those rate schedules where provision is specifically made for such service, and only under the conditions and at the rates and charges specified in such rate schedules. Emergency generators or sources of supply maintained solely for use in case of interruption of Company's service are not subject to this Rule.

(17)—*Submetering of electricity:*

The supply and service of electric energy by Company will be furnished to owners, tenants or occupants of any building or premises, directly to them as customers of Company through Company-owned individual meters, and will not be supplied through a master meter for submetering or resale by or to any owner, tenant or occupant of any such building or premises.

(18)—*Incorrect registration of meter:*

When, during any period, a meter fails to correctly register the amount of electricity consumed, the amount of the bill will be estimated, giving due consideration to

the amount of use for the periods immediately preceding and subsequent to such defective registration by the meter.

(19)—*Bills:*

Company will endeavor to deliver to Customer, periodically, by mail or messenger, a statement of the amount due Company for service furnished. When the interval between meter readings is substantially greater or less than a month, bills will be computed by prorating charges on the basis of the relationship between the time covered by the meter readings and one month.

Company reserves the right to read the meters and render bills bimonthly. When this is done, the number of kilowatt hours included in each block and the monthly minimum charge shall be doubled. If unusual circumstances occur during a billing period, thus causing inequity to Customer under this rule, proper adjustment shall be made by Company upon prompt disclosure of the facts.

Unless otherwise stated, the service classification sets forth gross and net prices.

Payment of the net amount of a current bill within fifteen days from the post-marked date of billing will be accepted provided all previous undisputed bills have been paid. Bills are due upon presentation and payment may be made at Company offices or designated places for payment of bills. Net rates are payable within fifteen days from the post-marked date of mailing of bill, except on accounts with local governmental bodies or the Commonwealth of Pennsylvania or authorized agencies of the Federal Government, for which thirty days will be allowed. Where the rates are set forth as gross and net under a service classification, the gross amount stated on the bill becomes due on the expiration of the net payment period; the Company may waive the collection of the gross amount on an overdue bill, provided no such waiver has been made on bills of the preceding eleven months. When reasonable doubt exists as to the post-marked date of mailing, the gross amounts shall be applicable unless

Customer by satisfactory evidence establishes the fact that payment is within fifteen days of such date.

Mailed remittances for the net amount for a current bill will be accepted by Company as a tender of payment within the net payment period if the enclosing envelope bears United States Post Office date stamp of the last net payment date, or any date prior thereto.

(20)—*Rights of way and governmental permits and consents:*

Company shall not be obligated to render service to Customer until satisfactory rights from governmental divisions or agencies and from property owners to install, operate and maintain Company's lines and equipment have been obtained.

Customer shall grant Company a right of way for its lines across or along the property owned or controlled by Customer, to the extent that the same is necessary to enable Company to render service to Customer.

(21)—*Service areas:*

Unless stated specifically in the service classification, the various service classifications contained in the tariff apply throughout the entire service area of Company.

(22)—*Character of service:*

Except as otherwise specified in particular service classifications, service will be supplied in the form of 60 cycles, alternating current, at only the standard voltage and phase available or as specified by Company in the locality in which the premises to be served are situated.

(23)—*Company lines:*

Company will construct, own and maintain, overhead supply lines located on highways or on rights of way acquired by Company, used or usable as part of Company's distribution system, and will provide and construct a service line or connection of a single span (nominally 100 feet) of open-wire construction to the first

suitable support provided by Customer, which shall be so located that the service span will be free of obstruction and will be satisfactorily supported at that point as required by its size and weight.

Where underground lines or services are desired by Customer, and where such are determined by Company to be appropriate to its system and to its general plans of development, or where underground is installed in accordance with Rule (32), Company will furnish such underground lines or services provided Customer bears the additional costs thereof in excess of the cost of overhead lines or services, or bears such additional costs as are provided in Rule (32) where applicable. Specifications and terms for such underground construction will be furnished by Company on request. In any other case the entire cost of underground lines and services shall be borne by Customer. Company reserves the right to designate as underground network areas certain areas where Customer or load density warrant, and in such areas underground lines will be installed by Company at its expense, except that the service on Customer's property (but not within the limits of any public way, street or alley) shall be installed, owned and maintained by Customer.

(24)—*Two-phase service:*

Company will continue to supply two-phase service from scott-connected, three-phase transformers to Customers who have not changed to three-phase equipment; provided Customer owns and maintains such transformers. In the event that Customer does not now receive service through Customer-owned transformers, Company will supply such transformers upon Customer's paying an additional 5% of the billing under the applicable service classification.

(25)—*Definition of terms and explanation of abbreviations:*

Adjustment of annual minimum charge. Where the minimum charge is an annual charge, credit for billing

for any given month in excess of the cost of service, based on the rate or monthly minimum charge as specified in the service classification, shall be subsequently allowed when the total of such cost of service for the year shall exceed the annual minimum charge, but in no event shall the bill be less than the tariff minimum or line extension minimum, whichever is greater. The remaining bills in the current twelve-month period shall be issued without regard to the annual minimum charge.

Auxiliary service: The service supplied to connected loads, the wiring for which is entirely separate and apart from the wiring for connected loads supplied from Customer's private generating equipment or other sources. (Also see "Breakdown service", "Standby service" and "Supplemental service").

Breakdown service: The service supplied for use in case of breakdowns or shut down of Customer's private generating equipment or failure of any other source of supply. (Also see "Auxiliary service", "Standby service" and "Supplemental service".)

Connected load: The sum of the HP, KW or KVA input ratings as specified in the service classifications, of all the devices located on Consumer's premises which are connected to Company's service, or which can be connected simultaneously by the insertion of fuses or by the closing of a switch. The manufacturer's nameplate rating may be used to determine the input rating of a particular device. In the absence of such manufacturer's rating, or whenever a test by Company shall indicate improper rating of a device, the rating will be determined on the basis of the kilovolt-amperes required for its operation.

Consumer: Any person, partnership, association or corporation, lawfully receiving service from Company.

Contract capacity: The capacity required for operation of Consumer's equipment, as stated in the application for service. When use of capacity at any time during the month exceeds stated requirements, contract capacity is automatically increased to use of capacity as measured.

Customer: The word "Customer" whenever used in this tariff shall have the same meaning and effect as the word "Consumer" as defined above.

Demand: The rate of use of energy during a specified time interval, expressed in kilowatts or kilovolt-ampere-hours. The word "Demand" wherever used in this tariff shall have the same meaning and effect as the words "Use of Capacity".

Holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day and all Sundays.

HP, Horsepower: Shall be computed as the equivalent of 750 watts.

Incidental use: As set forth in the service classifications, is considered to be the minor or lesser use of service.

KVA, kilovolt-ampere: Unit of measurement of use of capacity; 1,000 volt-amperes.

KVAH, kilovolt-ampere-hour: Unit of measurement of quantity of energy; an amount equivalent to the use of 1,000 volt-amperes for one hour.

KW, kilowatt: Unit of measurement of use of capacity, 1,000 watts.

KWH, kilowatthour: Unit of measurement of quantity of energy; an amount equivalent to the use of 1,000 watts for one hour.

Load factor: The average hours per month (730 hours) times the maximum 15-minute use of capacity, divided into the actual monthly KWH used.

Month: 1/12 of a year, or the period of approximately thirty days between two regular consecutive readings of Company's meter or meters installed on Consumer's premises.

Bimonthly: 1/6 of a year, or the period of approximately sixty days between two regular consecutive readings of Company's meter or meters installed in Consumer's premises.

Point of delivery: The point at which the service connection of Company terminates and Consumer's wiring and installation begins.

Power factor, in a single-phase circuit, is the ratio of the watts to the volt-amperes; and in a poly-phase circuit, is the ratio of the total watts to the vector sum of the volt-amperes in the several phases. Where the rate schedule provides for power factor correction, the power factor, unless otherwise specified, shall be computed from the registration of the watthour meter and a reactive component watthour meter ratcheted to prevent reverse rotation. The power factor for correction shall be taken as the next highest whole per cent, unless otherwise provided in the rate schedule.

Seasonal service: Supply of service where the premises are occupied only during a portion of each year while service remains connected for the entire year. Service to trailers or other small portable structures used as dwellings shall be treated as seasonal service until permanency of residence has been established.

Standby service: Service supplied by Company as standby power for use by Customer in case of failure of Customer's generating equipment. (Also see "Auxiliary service", "Breakdown service" and "Supplemental service".)

Supplemental service: Service supplied for use on premises where a part of the load is supplied by Customer's generating equipment whether by wiring separated from that which Company supplies, or whether operated in parallel with Company's system or whether connected by double-throw switches. (Also see "Auxiliary service", Breakdown service" and "Standby service".)

Short term service: Supply of service for general lighting or power and industrial lighting for periods of less than one year.

Temporary service: Service supplied for a temporary period of time, usually less than one year. Except as otherwise provided in Rule 31, temporary service will be supplied only under rate schedules which contain specific provisions for such service.

Use of capacity: The maximum rate of use of energy as measured.

The use of capacity shall be measured by commercially accurate indicating or recording instruments or devices,

showing, unless otherwise specified, the greatest 15-minute rate of use of energy.

When the use of capacity by equipment such as hoists, elevators, welding machines, X-rays, fire pumps, or other devices whose operating characteristics impose high starting currents or excessive momentary use of capacity, thereby causing unusual voltage fluctuations, or necessitate the installation of additional facilities, the measured use of capacity may, at option of Company, be increased in the following manner: when the KW connected load of such equipment exceeds the measured use of capacity, 60% of such connected load may be added to use of capacity established by meters, corrected for power factor. In like manner, when the KW connected load of such equipment is less than the measured use of capacity, 40% of such connected load may be added to the use of capacity established by meters corrected for power factor.

(26)—*Water heater specifications:*

Water heaters shall be of the non-inductive type and shall be of not less than thirty gallons tank capacity. Water heaters may be equipped with one heating element, or at Customer's option with two heating elements one of which shall be located near the top of the tank and the other near the bottom of the tank. When equipped with two heating elements, each shall be controlled by an individual and independent thermostat and wired in such manner that both heating elements shall not operate at the same time and so that the capacity of heating elements in use at any one time shall not exceed the capacity of the top heating element. The top heating element when used, with its thermostat, shall be so located as to heat approximately the top one-quarter of the tank volume. The maximum capacity of heating elements that may operate at one time in a tank shall not (C) exceed 3,500 watts for 30-gallon through 39-gallon tanks, 4,500 watts for 40 through 49-gallon tanks, and 5,500 watts for 50-gallon and larger tanks.

(C) Indicates change or addition.

(27)—*Auxilliary, breakdown, standby and supplemental service:*

Auxiliary, breakdown, standby or supplemental service may be supplied under Company's applicable rate schedules where the Rate Schedule contains a provision for such service, provided Company has facilities and capacity available. The rates and charges for such service will be as provided in the rate schedule.

(28)—*Beginning and ending service:*

Any Customer starting the use of service without first notifying and enabling Company to read the meter will be held responsible for any amount due for service supplied to the premises from time of last reading of meter, immediately preceding his occupancy, as shown by Company's books. Customer shall give written notice of intended removal from the premises.

(29)—*Line Extension Rule:*

Company's overhead single-phase distribution system will be extended to supply new Customers, provided the applicants requesting the line extension shall furnish without expense to the Company, satisfactory rights-of-way acceptable to Company necessary for the erection, maintenance and operation of the line extension, including trimming of such trees as Company deems necessary, under the following terms and conditions:

Plan A

Rates and conditions:

The rates applicable to new and existing Customers shall be the various service classifications covering service to domestic, general power and lighting Customers, provided, however, that the minimum charge shall not be less than provided herein, and in no case less than $2.80 per month. (I)

(I) Indicates increase.

Company, in order to be assured a definite revenue to safeguard new investment, may require an applicant for service under the line extension rule to make a nonrefundable advance payment to be applied to satisfy bills as and if they accrue; or to provide other satisfactory security. Such advance payment shall not exceed the total amount of the line extension minimum bills which would accrue over a three-year period of use. Company may also delay construction of any line extension until the house-wiring of Customer contracting to be served therefrom shall have been completed.

Monthly minimum charge:

Domestic and general power and lighting Customers served by single-phase line extensions of $13,200 volts or less, which do not exceed one-third mile per Customer, shall pay a $2.80 monthly (I) minimum extension charge to Company for service supplied under applicable rates. Residential and general Customers served by extensions, the length of which exceed one-third mile per Customer, shall pay an additional minimum charge calculated at the rate of $15.00 per mile for such excess length of line. In the event the rate schedule minimum charge is in excess of the line extension minimum charge, the rate schedule minimum charge will apply.

The minimum charges to all Customers on any single line extension shall be of equal value except that nothing herein contained shall preclude any Customer from assuming more than his pro rata share of the total monthly minimum charge, subject to acceptance thereof by the Company, nor shall this provision operate to decrease the minimum charge of the rate schedules to which this rule is applied.

Customers who desire service under two or more rate schedules shall pay the monthly minimum extension charge for each rate schedule under which service is supplied.

Customers supplied under borderline arrangements with another utility shall assume a minimum charge

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(I) Indicates increase.

based upon the combined line extension required to render service.

Additional Customers:

Additional Customers will be supplied from an existing line extension where the monthly minimum charge is $2.80 or more per Customer (I) at the minimum charge in effect on such line extension. Minimum charges in excess of $2.80 per month will be adjusted to lower values (not less than $2.80) to give credit for the addition of any new Customers who have not already been included in establishing the minimum charge.

Additional extensions:

A continuation of an existing line extension, including branches thereto, shall be considered as a new and separate line extension when the addition of the new extension will result in a higher minimum charge to Customers already receiving service from the existing line extension; otherwise Customers on the additional extension shall pay minimum charges determined by combining the original and the additional extension.

Term of contract:

The contract for service shall be for a term of not less than one year, and the minimum charges applicable under this line extension rule shall continue in effect for any continuation or extension of the contract term.

Customer requiring service under other than the above conditions:

In the case where supply facilities and extension conditions other than those prescribed in the line extension rule are required to render service, such as extra facilities for three-phase distribution lines, step-down transformation from transmission lines, unusual costs of tree trimming, or other unusual construction costs, the monthly minimum charges shall be proportionately increased on the basis of 1½% of the estimated construction cost of such additional facilities.

(I) Indicates increase.

Plan B

The Company's obligation to extend its facilities to a new point of delivery is limited to the assumption of new investment to the extent warranted by the revenue anticipated from the business to be served. If the Company is requested to extend or add to its facilities in cases where the extension of such facilities would not be justified under Plan A, the Company will determine from the circumstances of each case what guarantee of revenue or what financing shall be required of applicant.

(30)—*Increased capacity of or extension of facilities:*

Company reserves the right to require Customer to make a cash deposit with Company equivalent to the total cost to Company for the specific investments necessary to render service, the continuance of which may be of questionable permanency. Such cash deposit shall bear no interest and shall be refunded through credits of 10% of the monthly service bills rendered to Customer during the term of the agreed-upon contract. If at the termination of contract any balance of deposit remains unreturned, such balance shall be retained by Company less adjustment for salvage value.

(31)—*Temporary Service to Restricted Areas:*

Within any geographical area which the Company deems to have been formally delineated by proper governmental authority for public use or uses precluding development for permanent private use (hereinafter called a Restricted Area), service to new Customers, improvements, additions or reinforcements to facilities serving existing Customers, or extensions and added facilities originating in or passing through such area for service outside the Restricted Area, will be considered to be temporary and will be supplied only under the terms and conditions stated in this Rule 31. Such temporary service will be supplied when the Company's available installed facilities are of adequate capacity to render the service, provided the Customer pays in advance the estimated cost of establishing the account and of installing and removing all specific facilities especially provided to furnish such

service (hereinafter called Advance Payment). Such temporary service will be furnished under the provisions of any rate schedule applicable to the class of service, whether or not the rate schedule contains a provision for temporary service. If a rate schedule applicable to the class of service supplied contains a multiplying factor for temporary service, such factor shall apply to service supplied hereunder only in those cases where Company would normally have classed the service as temporary for reasons other than this Rule 31. At the option of the Company, bills for temporary service may be prorated and rendered at periodic intervals of less than one month and are due and payable upon presentation.

If the proper governmental authority determines that any existing or proposed installation is appropriate to the permanent plan of development for the public use or uses of such area, the Advance Payment for such facilities will be waived, or if already made, will be refunded, without interest, upon presentation of the receipt therefor, provided the Customer at such time executes a contract with Company for permanent service at such location, and further provided that any amount of advance payment that would have normally been required under the Line Extension Rule (Rule 29) will be retained and the remainder of the Advance Payment, if any, will be refunded to Customer.

The Company designates the Delaware Water Gap National Recreation Area as a Restricted Area and will designate other Restricted Areas when and as required by proper governmental authority.

(32)—*Underground Electric Service in New Residential Developments*

1.A. For the purposes of this rule only, the following terms shall have the meanings indicated for them.

(1) "Development"—Five or more adjoining unoccupied lots in a recorded plan for the construction of single-family residences (detached or otherwise) intended for year-around occupancy, or one or more adjoining lots for the construc-

tion of one or more apartment houses containing an aggregate of five or more family units, if electric service to such residential or apartment house lots necessitates extending the Company's existing distribution lines.

(2) "Distribution line"—An electric supply line from which energy is delivered to one or more service lines.

(3) "Service line"—A line receiving energy from a distribution line and delivering it to (a) the meter, or (b) a disconnection device, controlling service to the residence or apartment building, whichever is nearer the distribution line. *For the purpose of paragraph C (4), that portion of the service line which extends from the curb line will be used for computation of additional charges.*

(4) "Average front-footage"—The quotient of (a) the total front-footage of all lots within the development, excluding the longer side of each corner lot, divided by (b) the total number of lots within the development.

(5) "Rowhouse"—One of a continuous row of five or more single-family residences, in which the house at each end of the row has one-party wall, and each of the intervening houses has two-party walls.

B. All distribution and service lines installed pursuant to an application for electric service within a development shall be installed underground; shall conform to the Company's construction standards and Pa. P.U.C. Electric Regulation Section 402 Rule 16—Wire Crossings; and shall be owned and maintained by the Company. Such installation shall be performed by the Company or by such other entity as the Company may authorize. Any street-lighting lines installed then or thereafter shall also be installed underground, upon terms and conditions prescribed elsewhere in this tariff. The Company shall not be liable for injury or damage occasioned

by the willful or negligent excavation, breakage or other interference with its underground lines by other than its own employees or agents.

C. The Applicant for electric service to a development shall:

(1) At his own cost, provide the Company with easements satisfactory to the Company for occupancy by distribution, service and street-lighting lines and related facilities except in public ways which the Company has the legal right to occupy.

(2) At his own cost clear the ground, in which the aforesaid lines and related facilities are to be laid, of trees, stumps and other obstructions, and rough grade it to within six inches of final grade, so that the Company's part of the installation shall consist only of trenching, laying of the lines, and backfilling to rough grade or the direct plowing-in of electric line as the case may be. At the option of the Company, the Applicant or his agent may perform the trenching and backfilling subject to inspection and approval by the Company.

(3) Request electric service at such time that the aforesaid lines may be installed before curbs, pavements and sidewalks are laid; keep the route of lines clear of machinery and other obstructions when the line installation crew is scheduled to appear; and otherwise cooperate with the Company to avoid unnecessary costs.

(4) Pay to the Company, in advance or under such credit terms as the Company may require, the following charges for each lot for which Applicant seeks electric service:

(a) *Per house lot:*

I. If the trenching and backfilling is not performed or provided by the Applicant, the following charges shall apply:

Lot charge	$195.00

Additional charge, per foot of average front-footage in excess of 100 feet .... $ 1.00

Additional charge, per foot of service line in excess of 75 feet ..... $ 1.00

II. If the trenching and backfilling is performed or provided by the Applicant, a credit of 40 cents per foot shall be applied for each foot of distribution and/or service line trenching and backfilling performed or provided by Applicant.

(b) *Per apartment house lot and rowhouse lot:*

The charge per apartment house lot and rowhouse lot shall be the amount by which the estimated cost of underground facilities exceeds the estimated cost of overhead facilities for serving the lot, as determined by the Company after Applicant has submitted his plans for placement, lay-out, voltage, and other factors affecting such costs.

(c) *Special additional charge:*

Whenever installation of underground facilities to serve a house or apartment house necessitates removal and replacement of paving or sidewalks, or excavation through rock, hard shale or other hard substances, Applicant shall pay an additional charge equal to the extra costs thereby occasioned, as determined by the Company. If requested by Applicant, Applicant shall pay any additional cost incurred by the Company for providing underground facilities that deviate from the Company's established underground construction practices and standards.

D. If the Applicant fails to comply with Paragraph C(2) or C(3), or changes his plot plan after installation of the Company's lines has begun, or otherwise necessitates additional costs by his act or failure to act, such additional costs shall be borne by the Applicant.

E. Whenever the distance from the end of the Company's existing distribution line to the boundary of the development is 100 feet or more, the 100 feet of new distribution line nearest to but outside such boundary shall be installed underground if practicable; and whenever such distance is less than 100 feet from said boundary, all of the new distribution line nearest to but outside such boundary shall be installed underground if practicable. The installation required by this paragraph shall be provided by the Company, without cost to the Applicant.

F. This rule shall apply to all Applications for service to developments, rowhouses and apartments, hereinbefore defined, which are filed after the effective date of the rule.

(33)—*Pennsylvania Public Utility Commission:*

All contracts are taken subject to such changes in or revisions of service classifications or the Rules and Regulations, as may from time to time be filed with or allowed by the Pennsylvania Public Utility Commission.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 71-453

[Filed, Nov. 5, 1971, C. H. Campion, Clerk,
Per JEC, Deputy Clerk]

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,
PLAINTIFF

-*vs*-

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,
DEFENDANT

MOTION TO DISMISS

NOW comes the Defendant above-named and by its Attorneys, Nogi, O'Malley & Harris, moves to dismiss the action and in support thereof assigns the following:

1. The Complaint fails to state a cause of action upon which relief can be granted.
2. The Court lacks jurisdiction over the subject matter because

(a) There is no diversity of citizenship between the parties to this action and
(b) The action complained of does not constitute "state action" within the intendment of the Civil Rights Act.

WHEREFORE, Defendant demands that judgment be entered in its favor and against the Plaintiff.

NOGI, O'MALLEY & HARRIS

BY /s/ Russell J. O'Malley
BY /s/ [Illegible]
Attorneys for Defendant

ORDER

Now, this 30th day of June, 1972, in accordance with memorandum filed this day, defendant's motion is granted and plaintiff's claim is dismissed.

/s/ [Illegible]
United States District Judge

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania corporation.

Civ. No. 71-453.

United States District Court,
M. D. Pennsylvania.
June 30, 1972.

Civil rights complaint in forma pauperis filed by customer on behalf of herself and all others similarly situated seeking money damages and declaratory relief against utility which allegedly violated customer's constitutional rights when electrical services to her home were summarily terminated without prior notice or hearing on the merits. On a defense motion to dismiss the complaint, the District Court, Nealon J., held that since the utility had acted pursuant to its own regulations and out of a purely private, economic motive, namely, the nonpayment of past due bills, and since no state official participated in the practice complained of, nor was it alleged that the state requested or cooperated in the suspension of services, the customer failed to make a sufficient showing of state involvement in the complained of activity to prevail against a motion to dismiss for lack of action under color of state law, regardless of the state requirement that the utility clearly spell out any penalties to be imposed for nonpayment of bills.

Motion granted and complaint dismissed.

1. Civil Rights—13.12(2)

A complaint which relies on statute in part providing that every person who, under color of state law, subjects any citizen of the United States to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable in an action at law or

other proper proceeding must initially establish two elements; first, the conduct complained of must have been done under color of state law and, secondly, the conduct must deprive another of rights, privileges or immunities secured by the Constitution of the United States. 42 U.S.C.A. § 1983.

2. Civil Rights—13.5(2)

In determining the presence of state action in a particular case involving an alleged deprivation of rights, a court must examine the facts and circumstances to see if conduct that was formerly private has become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. 42 U.S.C.A. § 1983.

3. Federal Civil Procedure—1781

Since utility, against which a complaint in forma pauperis was filed by customer who alleged that her constitutional rights had been violated when electrical services to her home were summarily terminated without prior notice, acted pursuant to its own regulations and out of a purely private, economic motive, namely, the nonpayment of bills, and since no state official participated in the activity, nor was it alleged that the state requested or cooperated in the suspension of services, the customer failed to make a sufficient showing of state involvement to prevail against a motion to dismiss for lack of action under color of state law, regardless of state requirement that a utility spell out any penalties to be imposed for nonpayment of bills. 42 U.S.C.A. § 1983; 66 P.S. Pa. §§ 1141, 1144, 1149, 1172, 1217, 1341, 1348.

Alan N. Linder, York, Pa., Richard A. Hesse, Director National Consumer Law Center, Chestnut Hill, Mass., for plaintiff.

Russell O'Malley, Irwin Schneider, Scranton, Pa., Ryan, Russell & McConaghy, Reading, Pa., for defendant.

J. Shane Creamer, Atty. Gen., Curtis Pontz, Deputy Atty. Gen., Dept. of Justice, Harrisburg, Pa., for Commonwealth of Pa.

MEMORANDUM AND ORDER

NEALON, District Judge.

On October 18, 1971, plaintiff filed a Civil Rights complaint in forma pauperis under 42 U.S.C. § 1983 [1] on behalf of herself and all others similarly situated seeking money damages and declaratory and injunctive relief against the defendant utility. Plaintiff alleges that her constitutional rights were violated when electrical services to her home were summarily terminated without prior notice or hearing on the merits. That same day a temporary restraining order was issued by this court enjoining defendant from terminating plaintiff's service until October 22, the day set for the hearing on the preliminary injunction. However, at the hearing on October 22, because of the short notice given to defendants, it was agreed between the parties that plaintiff's service was to be continued in order to allow defendant to respond to plaintiff's complaint. Subsequently, defendant moved to dismiss the complaint on the grounds that (1) the court lacks subject matter jurisdiction in that the defendant utility did not act under color of state law and (2) the complaint fails to state a cause of action on which relief can be granted. Numerous briefs having been filed, this motion is now before the court for decision.

In her complaint, plaintiff alleges that her service was terminated because she was unable to pay Metropolitan Edison for past due utility bills. Plaintiff disputes the validity of the bill in that she alleges that she is not wholly responsible for it since one James Dodson, a former co-occupant of the premises, is the party who orig-

[1] Any question as to the jurisdiction of this court under 28 U.S.C. § 1343 to the extent that it is alleged that a civil rights action lies only for alleged deprivation of personal rights as opposed to property rights was put to rest by the Supreme Court's recent decision in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

inally subscribed for the services and had agreed to pay the bill. Finally, plaintiff contends that she has made several tenders of partial payments which were rejected by the utility company.

Metropolitan Edison's tariff, filed with the Pennsylvania Utility Commission, provides that the company, on reasonable notice, may discontinue utility services to a customer for nonpayment of utility bills.[2] However, the company's regulations do not require any type of hearing before the service is terminated. Plaintiff insists that the utility's failure to provide a hearing prior to termination constitutes a denial of due process of law. Plaintiff also alleges that because of her indigency she is unable to pay the bill and thus faces automatic termination, whereas a more affluent person could pay the challenged bill and then subsequently attack its validity. Such disparity of treatment, plaintiff claims, is in violation of the equal protection clause of the Fourteenth Amendment.

[1] It is well settled that a complaint which relies on 42 U.S.C. § 1983 must initially establish two elements. First, the conduct complained of must have been done under color of state law. Private action, however wrongful, cannot form the basis for relief under § 1983. Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Secondly, the conduct complained of must deprive another of rights, privileges, or immunities secured by the Constitution of the United States. See Adickes, *supra*. It is defendant's position in its motion to dismiss that the complaint is fatally defective as to one of these elements, since they insist that Metropolitan Edison did not act under "color of state law" within the meaning of § 1983.

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[2] In Tariff No. 41 of the Metropolitan Edison Company, filed with the Pennsylvania Public Utility Commission, Rule 15 provides: "Company reserves the right to discontinue its service on reasonable notice and to remove the equipment in case of nonpayment of bill of violation of the Pennsylvania Public Utility Commission's or Company's Rules and Regulations; . . ."

Although the core concept of "state action" has been frequently discussed by the Supreme Court, an exact definition has never been formulated.

> ". . . to fashion and apply a precise formula for recognition of state responsibility . . . is an 'impossible task' which 'This Court has never attempted' . . . Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961).

[2] Thus, in determining the presence of state action in a particular case, a court must examine the facts and circumstances of that case to see if

> "(c)onduct that is formerly 'private' (has) become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966).

In essence, the factors upon which plaintiff relies in establishing state action are that (a) the Commonwealth of Pennsylvania has granted Metropolitan Edison, as a privately-owned public utility, a monopoly in the distribution of electricity in the York area and (b) its daily operation is subject to the close supervision and regulation of the Pennsylvania Public Utility Commission. Specifically, plaintiff cites the P.U.C.'s power (1) to regulate and review rates established by the utility;[3] (2) to establish regulations necessary in the supervision of a utility doing business within Pennsylvania;[4] (3) to require that all rules and regulations adopted by the utilities themselves be subject to the approval of the P.U.C.;[5] (4) to

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[3] 66 P.S. §§ 1141, 1144, 1149.

[4] 66 P.S. § 1341.

[5] 66 P.S. § 1172.

provide for an inspection and access to any and all facilities and records of public utilities which the Commission deems necessary;[6] and (5) to prohibit discriminatory practices in rates[7] and services,[8] as demonstrating that the operation of Metropolitan Edison "is so intertwined with the state as to make it inseparable from it." Evans v. Newton, *supra* at 299, 86 S.Ct. 486. In addition, plaintiff maintains that the state is involved with the very activity complained of, i.e. the termination of service, in that Pennsylvania P.U.C. Tariff Regs. VIII provides that

> "Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ."

On the other hand, defendant argues that the overwhelming weight of authority has held that merely because a private corporation, such as Metropolitan Edison, enjoys an economic monopoly which is supervised and controlled by a state-wide regulatory body does not necessarily bring its *every act* within the purview of Section 1983. *See e. g.* Martin v. Pacific Northwest Bell Telephone Co., 441 F.2d 1116 (9th Cir. 1971); Kadlec v. Illinois Bell Telephone Co., 407 F.2d 624 (7th Cir. 1969); Lucas v. Wisconsin Electric Power Co., 322 F.Supp. 337 (E.D.Wis.1970); Taglianetti v. New England Tel and Tel. Co., 81 R.I. 351, 103 A.2d 67 (1954). Defendant contends that in order for state action to exist in the instant case "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with *the activity that caused the injury.*" (emphasis added) *See* Martin v. Pacific Northwest Bell Telephone Co., *supra*, 441 F.2d at 1118. Kadlec

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[6] 66 P.S. §§ 1217, 1348.

[7] 66 P.S. § 1144.

[8] 66 P.S. § 1172.

v. Illinois Bell Telephone Co., *supra Cf.* Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).[9] I agree.

In Kadlec v. Illinois Bell Telephone Co., *supra*, perhaps the leading case dealing with the question of state action as applied to a regulated public utility, the Seventh Circuit Court of Appeals affirmed a dismissal of a Civil Rights complaint against a telephone company which charged that the company had unconstitutionally terminated certain of plaintiff's commercial telephone services, finding that the termination had not been done under color of state law. The Court held that the acts of the telephone company, taken pursuant to its own regulations, could not be regarded as acts done under color of law simply because the company's regulations had been filed with and approved by an agency of the state. The court elaborated:

> "Motivated by purely private economic interests and pursuant to its *own regulations*, Illinois Bell terminated plaintiffs' Call-Pak service. The only apparent state connection with the termination rests in the fact that defendant company filed its regulations with state authorities; the state in no sense benefited from, encouraged, requested or co-operated in this suspension of service."
>
> ". . . . Here, the nexus between the state and defendant's conduct was not sufficient to maintain an action under § 1983."

407 F.2d at 626.[10]

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[9] Support for this contention is found in Burton v. Wilmington Parking Authority, *supra*, where the court held that "(t)he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as *a joint participant in the challenged activity*, which, on that account, cannot be considered to have been so 'purely private' as to fall within the scope of the Fourteenth Amendment." (emphasis supplied)

[10] More recently, in another context, the Supreme Court considered the question of whether a state's regulatory scheme constituted state action and noted that the Court has never held that state regulation in any degree whatever would implicate the state in private conduct but would require significant involvement in the proscribed

[3] The only apparent state involvement with the activity complained of here is a Tariff Reg. VIII of the Pennsylvania P.U.C. which requires that every utility that imposes penalties on its customers for failure to pay bills promptly shall clearly set forth in their tariff the exact conditions under which the penalties are to be imposed. However, the mere requirement that Metropolitan Edison clearly spell out any penalties it will impose for non-payment of bills does not clothe Metropolitan Edison with state authority nor transform the defendant's regulations into acts of the state.[11] Rather, the purpose of Tariff Reg. VIII is to insure that public utilities inform their patrons of any possible penalty for failing to pay their bills. As in *Kadlec*, defendant here acted pursuant to its own regulations and out of a purely private, economic motive. No state official participated in the practice complained of, nor is it alleged that the state requested or co-operated in the suspension of service. Thus, plaintiff has failed to make a sufficient showing of state involvement in the activity complained of to prevail against defendant's motion to dismiss. Accordingly, the complaint will be dismissed.

Because of the view I take of this case, it will be unnecessary to consider the merits of plaintiff's contention that her services were terminated in violation of her constitutional rights. I note, in passing, however, that plaintiff submitted no evidence indicating disparity of treatment which constituted a denial of equal protection of the law.

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activity. The Court stated that "(h)owever detailed this type of regulation may be in some particular, it cannot be said to in any way foster or encourage racial discrimination . . . (n)or can it be said to make the State in any realistic sense a partner or even a joint venturer in the Club's enterprise". Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-177, 92 S.Ct. 1965, 1973, 32 L.Ed.2d 627 (1972).

[11] This does not mean, of course, that the State may not, by regulation, require a hearing before service may be terminated by a public utility. While such a regulation may be laudable, it is not constitutionally required.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 71-453

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

NOTICE OF APPEAL

Notice is hereby given that Catherine Jackson, on behalf of herself and all others similarly situated, Plaintiffs above named, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order and Memorandum of the United States District Court, Middle District of Pennsylvania, granting Defendant's motion and thereby dismissing Plaintiff's Complaint, entered in this action on the 30th day of June, 1972.

TRI-COUNTY LEGAL SERVICES

/s/ Alan Linder
ALAN N. LINDER
Esquire
40 North Beaver Street
York, Pennsylvania 17404
Attorney for Plaintiff

July 13, 1972
DATE

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 71-453

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

ORDER

Upon consideration of the motion of plaintiff to restore during the pendency of the Appeal in the case the Temporary Restraining Order issued by this Court against the defendant on October 18, 1971, and subsequently extended by agreement of the parties, and

It appearing to the Court that the status quo should be preserved until the disposition of plaintiff's Appeal by the Court of Appeals for the Third Circuit,

It is Ordered that the Temporary Restraining Order issued on October 18, 1971 and extended by agreement is restored pending determination of plaintiff's Appeal and defendant is enjoined from summarily terminating and discontinuing plaintiff's electrical services, without a prior notice and hearing. Plaintiff is not required to file a Bond.

United States District Judge
/s/ [Illegible]

Dated: August 7, 1972

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1745

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,
APPELLANT

vs.

METROPOLITAN EDISON COMPANY,
a Pennsylvania Corporation,

(D.C. Civil Action No. 71-453)

On Appeal from the United States District Court
For the Middle District of Pennsylvania

Present: HUNTER * and WEIS, *Circuit Judges*, and
SCALERA, *District Judge*.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 30, 1972, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

/s/ Thomas E. Quinn
Clerk

August 21, 1973

[COPY]

Certified as a true copy and issued in lieu of a formal mandate on September 12, 1973.

Test: /s/ Thomas E. Quinn
Clerk, United States Court of
Appeals for the Third Circuit

* Judge Hunter was present at the argument of this case but did not participate in the decision.

CATHERINE JACKSON, On Behalf of Herself and All Others Similarly Situated,
APPELLANT,

v.

METROPOLITAN EDISON COMPANY, a Pennsylvania Corporation,

No. 72-1745.

United States Court of Appeals, Third Circuit.

Argued May 4, 1973.
Decided Aug. 21, 1973.

Civil rights complaint by customer on behalf of herself and all others similarly situated seeking money damages and declaratory relief against utility which allegedly violated customer's constitutional rights when electrical service to her home was summarily terminated without prior notice or hearing on the merits. The United States District Court for the Middle District of Pennsylvania, William J. Nealon, Jr., J., dismissed and the complaint, 348 F.Supp. 954, and appeal was taken. The Court of Appeals, Weis, Circuit Judge, held that since utility acted pursuant to its own regulations and out of a purely private economic motive, namely the nonpayment of bills, and since no state official participated in the activity, customer failed to make a sufficient showing of state involvement to prevail against motion to dismiss for lack of action under color of state law.

Affirmed.

James Hunter, III, Circuit Judge, was present at argument but did not participate in the decision.

1. Civil Rights—13.5(2)

Generally there may be a finding of "state action or action under color of state law," within meaning of civil rights statute, when a private party's action occurred in conjunction with the business in which the state may be considered a partner or joint venturer in a profit-making

field, when a state statute or custom or usage compels the result, when a state agency affirmatively orders or specifically approves the activity in the course of its regulatory rule making, or when a private agency in effect is acting on behalf of and furnishing a typical government service. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

2. Constitutional Law—296(1)

Procedure requiring utility customer to sue for refund after payment of amount claimed to be due the utility, in order to avoid shutoff of service does not violate due process. U.S.C.A.Const. Amend. 14.

3. Corporations—382½

The right to receive utility service does not rise to the level of a constitutional right or an entitlement from the state.

4. Corporations—382½

Right of a customer to receive utility service pending resolution of a dispute between customer and utility is not protected by the Constitution.

5. Federal Civil Procedure—1781

Since utility, against which complaint was filed by customer who alleged that her constitutional rights had been violated when electrical service to her home was summarily terminated without prior notice, acted pursuant to its own regulations and out of a purely private, economic motive, namely the nonpayment of bills, and since no state official participated in the activity, nor was it alleged that state requested or cooperated in the suspension of services, customer failed to make a sufficient showing of state involvement to prevail against a motion to dismiss for lack of action under color of state law. 42 U.S.C.A. § 1983; 66 P.S.Pa. § 1101 et seq.

Alan N. Linder, Tri-County Legal Services, York, Pa., for appellant.

Russell J. O'Malley, Paul A. Barrett, Nogi, O'Malley & Harris Scranton, Pa., for appellee (Samuel B. Russell, Ryan, Russell & McConagley, Reading, Pa., of counsel).

James R. Adams, Edward J. Weintraub, Deputy Attys. Gen., for Com. of Pa., as amicus curiae.

Edward J. Dailey, National Consumer Law Center, Inc. as amicus curiae.

Jonathan M. Stein, I. David Pincus, David J. Ackerman, Philadelphia, Pa., Fellowship Commission's Committee on Consumer and Citizen Complaints, as amicus curiae.

Before HUNTER *and WEIS, Circuit Judges, and SCALERA, District Judge.

OPINION OF THE COURT

WEIS, Circuit Judge.

Whether the Civil Rights Act was violated when an electric utility shut off service to its customer in the issue to be decided in this case.

The defendant is a privately owned and operated Pennsylvania corporation, granted a monopoly to deliver electricity to the populace in the area of York, Pennsylvania. Like similar utilities in Pennsylvania, it is subject to the provisions of the Public Utility Code [1] and the regulations of the Public Utility Commission authorized by the Act.

The plaintiff was a residential customer of the Metropolitan Edison Company and in October of 1971 was claimed to have owed the defendant for past due bills. She disputed the validity of the charges, asserting that a former co-occupant of the premises was responsible for the amount due. Despite several tenders by the plaintiff of partial payments, the defendant terminated service on October 1, 1971 by disconnecting the line on the company's utility pole on the street near the plaintiff's house.

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* Judge Hunter was present at the argument of this case but did not participate in the decision.

[1] 66 Purdon's (Pennsylvania) Statutes §§ 1101 *et seq.*

The plaintiff then filed suit under the Civil Rights Act, 43 U.S.C. § 1983,[2] asking both damages and injunctive relief.

The district court held an evidentiary hearing on the request for a preliminary injunction. The plaintiff testified that on an occasion about a year previously when the electricity had been disconnected, she left her home for about 45 minutes to telephone the utility and when she returned, the power had been restored. She admitted not receiving bills in the ensuing year but claimed that one Dodson, the co-occupant of the house, had received and paid monthly statements from the defendant.

Although Dodson left the premises about August, 1971, the plaintiff admitted that no bills were received at her home thereafter. She testified that on October 6, 1971 a representative of Metropolitan came to the house inquiring about Dodson and on the following day another employee looked at the meter and told her that somebody had tampered with it. The plaintiff then asked that service be reinstated in the name of Robert Jackson. At the hearing she admitted that this was in fact her 12 year old son.

At the conclusion of the plaintiff's testimony and after the filing of briefs, the district court dismissed the case because there was not "a sufficient showing of state involvement in the complained of activity . . ."[3]

The plaintiff asserts that the defendant's action in arbitrarily terminating service to her was under color of state law because:

1. As a utility, the defendant was closely regulated by the Commonwealth of Pennsylvania;
2. In supplying electricity, Metropolitan Edison was performing a governmental function;

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[2] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[3] 348 F.Supp. 954 (M.D.Pa.1972).

3. The defendant was either acting as an agent for the state or a joint participant with it; and
4. The failure to act by the state amounted to "state action".

Litigation between utilities and their customers based on §1983 has been the subject of decisions in the Courts of Appeals of the Eighth, Seventh, and Sixth Circuits, as well as a number of district courts. While on the facts the situations in the reported cases are capable of distinction, an objective appraisal might suggest that the differing results represent a continued uncertainty as to the application of the "color of state law" test.

The Supreme Court has frankly admitted the difficulty of drawing guidelines, and in Moose Lodge 107 v. Irvis, 407 U.S. 163, 172, 92 S.Ct. 1965, 1971, 32 L.Ed.2d 627 (1972), Justice Rehnquist wrote:

> "While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'State action,' on the other hand, frequently admits of no easy answer. 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.' "

While the *Moose* case was concerned with a private club rather than a utility, the following quote is helpful:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from State conduct set forth in the *Civil Rights Cases*, *supra*, and adhered to in subsequent decisions."

The Supreme Court went on the discuss the multiform variety of control that the state exercised over the holder

of a liquor license which the district court had described as "pervasive" and went on to say:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."

The Court thus recognizes the importance of a connection between the state regulation and the proscribed conduct.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), presented a situation where the Court felt that a state agency which leased premises to a restauranteur became a joint-venturer or partner, in a sense, in the enterprise and therefore shared in the discriminatory policies of the private concern. Furmore, in that case the plaintiff could point to a specific state statute which was said to permit the offending conduct.

Adickes v. Kress, 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970), also was concerned with conduct of a private enterprise said to be in violation of § 1983. The Court there pointed out that the involvement of a policeman in a conspiracy situation provides the necessary ingredient of state action in a claim of violation of the Fourteenth Amendment, whether or not the actions of the officer were officially authorized. The Court also said:

> "Whatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of § 1983 . . . we think it essential that he act with knowledge of and pursuant to the statute." (At pp. 161, 162, f.n. 23, 90 S.Ct. at pp. 1598, 1611)

The Court noted also that a state is responsible for the discriminatory act of a private party if the state by its law has compelled the act.

Public Utility Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952), found "state" involvement where the Commission after conducting hearings af-

firmatively approved the action which was held to be objectionable. The Court said very specifically and clearly:

> ". . . we do not rely on the mere fact that Capital Transit operates a public utility . . . Nor do we rely upon the fact that . . . Capital Transit now enjoys a substantial monopoly of street railways . . ."

Pollak, therefore, is not authority for the holding that the actions of a public utility which enjoys a monopoly, *ipso facto*, are those of a state agency, nor does it hold that all activities conducted under the auspices of a utility regulatory body satisfy the "color of state law" test.

[1] Though it is difficult to summarize in this complex field and without intended to be all inclusive, it may be said generally that there may be a finding of state action or action under color of state law: [4]

1. When a private party's action occurred in conjunction with a business in which the state may be considered a partner or joint venturer in a profit making field (Burton v. Wilmington, *supra*); or
2. when a state statue or custom or usage compels the result (Adickes v. Kress, *supra*); or
3. when a state agency affirmatively orders or specifically approves the activity in the course of its regulatory rule making (Public Utility Commission v. Pollak, *supra*); or
4. when a private agency in effect is acting on behalf of and furnishing a typical government service (Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946)).

A brief discussion of the regulatory plan under which the defendant Metropolitan operates is helpful in deciding whether it falls within any of the categories outlined.

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[4] While it has been suggested that "state action" and "action under color of state law" are synonymous, U. S. v. Price, 383 U.S. 780, 794, f.n. 7, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), at least one court has indicated its belief that the "color of state law" test may be more demanding. Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972).

The rates which the defendant charges its customers are regulated by and must be approved by the Public Utility Commission. Additionally, the Commission is empowered to issue regulations necessary for supervision of utilities doing business in Pennsylvania, including provisions for inspection and access to facilities and records of the company as the Commission thinks necessary. The Commission is charged with prohibiting discriminatory practices in rates and services, and all rules and regulations of the utilities are subject to its approval.

As part of the rate-setting procedure, the utility must file a tariff with the Commission in compliance with its rules. The Commission Regulation on Tariffs, § VIII, provides that:

> "Every public utility that [imposes] penalties upon its customers for failure to pay bills promptly shall provide in its filed tariffs a rule setting forth clearly the exact circumstances and conditions in which the penalties are imposed . . ."

Pursuant to the regulation, the defendant filed in Tariff No. 41, its Rule 15 (issued April 30, 1971, effective June 30, 1971):

> "Company reserves the right to discontinue its service on reasonable notice and to remove its equipment in case of non-payment of bills or violation of the Pennsylvania Utility Commission's or Company's rules and regulations; or, without notice, for abuse, fraud, or tampering with the connections, meters, or other equipment of company."

Since the record is silent on the point, we assume that no objection was raised to this particular provision of the tariff and, therefore, there was no hearing before the PUC which would have required affirmative action by that body such a occurred in the Pollak case.

While the tariff purports to give the company the right of re-entry upon the customer's premises for purpose of removing its equipment after termination of service, it seems clear from the record that such action was not taken in this case. The service was disconnected by the

defendant at its pole, some distance removed from the home of the plaintiff.

Thus the action of the company in terminating service in this case was taken pursuant to its own regulations using its own personnel without entering onto the customer's private property, without ultizing any state statute or regulation permitting re-entry on the customer's premises, and without any specific direction or authorization of the regulatory body.

The factual background in this case is quite similar to that in Lucas v. Wisconsin Electric Power Company, 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114, 93 S.Ct. 928, 34 L.Ed.2d 696 (1973), where the Court of Appeals for the Seventh Circuit, sitting en banc, held that there had not been action under color of state law and said:

> "The 'under color of' provision encompasses only such private conduct as it supported by state action. That support may take various forms, but it is quite clear that a private person does not act under color of state law unless he derives some 'aid, comfort, or incentive,' either real or apparent, from the state. Absent such affirmative support, the statute is inapplicable to private conduct.
>
> "We believe that affirmative support must be significant, measured either by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy to bring the statute into play (466 F.2d pp. 655, 656). . . . we believe the significance of that support must be evaluated to determine whether it brings § 1983 into play; otherwise the federal statute would soon supersede vast areas of state administrative regulation." (466 F.2d p. 657)

The Court concluded that the monopoly factor did not in a practical way deprive the customer of an effective remedy nor did it add the necessary state support to private conduct so as to transform an issue of state regulatory policy into a civil rights case.

The Court's action thus affirmed its earlier ruling in Kadlec v. Illinois Bell Telephone, 407 F.2d 624 (7th Cir. 1969), cert. denied, 396 U.S. 846, 90 S.Ct. 90, 24 L.Ed.2d 95 and was consistent with Particular Cleaners v. Commonwealth Edison, 457 F.2d 189 (7th Cir. 1972). *See also*, Martin v. Pacific Northwest Bell Telephone Co., 441 F.2d 1116 (9th Cir. 1971), where that Court said:

> "The fact that a private corporation, such as Pacific Bell, enjoys an economic monopoly which is protected and regulated by the state does not necessarily bring its every act within the purview of Section 1983. [citation], for as well stated in Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968), 'the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury.' "

In Palmer v. Columbia Gas Company, 479 F.2d 153 (1973), a panel of the Court of Appeals for the Sixth Circuit came to a contrary conclusion in a situation where the utility availed itself of a right of entry on the customer's property, that privilege having been granted by a state statute.[5]

The color of state law test was found to have been satisfied in Ihrke v. Northern States Power Company, 459 F.2d 566 (8th Cir. 1972), reversed on mootness, 409 U.S. 815, 93 S.Ct. 66, 34 L.Ed2d 72 (1972), where the city which regulated the utility also received 5% of the company's gross earnings. In that instance it might well be said that while the city did not collect the utility bills, it shared directly in them and to some extent was a joint venture with the power company.[6]

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[5] The Lucas court placed emphasis upon the lack of entry upon the resident's premises and implied that its decision might have been different had the utility availed itself of the state statute to enter the customer's home in order to cut off the power.

[6] *See also Stanford v. Gas Service Co.*, 346 F.Supp. 717 (D.C.Kan. 1972); Hattell v. Public Service Co. of Colorado, 350 F.Supp. 240 (D.C.Colo.1972); Bronson v. Consolidated Edison, 350 F.Supp. 443 (S.D.N.Y. 1972). The fact situations in many of the cases present instances of callous and overbearing conduct by personnel of large

While the Supreme Court in the *Moose Lodge* case refused to prohibit racial discrimination in a private club setting finding no state action in the extensive regulation of the Liquor Control Board, a differing result was reached in *Burton, supra*, where a public restaurant was involved but less state control was evident. It may well be that the underlying reasoning for the differing results in the two cases is that in *Moose Lodge* the national prohibition against racial discrimination had come into conflict with the fundamental right of free association, while in *Burton* the tension arose between discrimination and the freedom to operate a business which should have been open to the public at large. In this analysis, it is not at all clear that the result in *Moose Lodge* would not have been different had the discriminating defendant been a public utility rather than a private club.

It is important, therefore, that the issues here be considered not only on the premise of color of state law but that there be an examination and evaluation of the underlying federal rights of the parties, particularly those which the plaintiff espouses.[7] While the plaintiff and *amici* speak of utility service as being "indispensable to life and health" and termination of those services as depriving her of the very "means and necessities of life," we think those characterizations are extreme and serve only to becloud the real issues.[8]

Granted that in today's urban society the supply of electricity to a home does much to make life more comfortable and convenient, its absence in the usual situation

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utilities, familiar examples of the abuse of authority by those who have little of it. Decisions in favor of the plaintiff in such instances carry strong emotional appeal but are not necessarily persuasive legal authority on the applicability of § 1983. We are not convinced that state courts or the PUC in Pennsylvania would not issue appropriate orders in such outrageous situations as those detailed in Bronson and Palmer, *supra*.

[7] *See* Williams, The Twilight of State Action, 41 Texas L.R. 347 (1963).

[8] *See* Abernathy, Expansion of the State Action Concept under the Fourteenth Amendment, 43 Cornell Law Quarterly 375, 405 (1958).

does not pose an immediate threat to the life of the occupants. The fact that people, even today, manage to carry on their lives in isolated areas without electricity is proof enough of that.

There is a clear distinction between depriving a community of power where disastrous results might occur if hospital, water purification, and communications facilities were interrupted and the situation in a dwelling when the absence of electrical energy would require manual operation of furnace controls, illumination by kerosene lantern, or refrigeration by ice. We do not minimize the inconvenience of the absence of electrical service or deny that special circumstances may result in serious consequences but simply indicate doubt with the flat assertion that failure to provide this form of energy to a home is a threat to life itself. It is probably more accurate to say that the service is essential to the kind of life we are accustomed to, particularly in an urban society.

Furthermore, as convenient as this utility service is, as desirable as its continuation may be, and as dependent on it we may believe ourselves to be because of its availability and benefits, the fact remains that as of this time at least, the state is not obligated to furnish electricity without charge to its citizens.[9] Those who wish to avail themselves of it must pay for it.[10]

This premise the plaintiff does not dispute here, nor does she deny that if it is proved that she is mistaken in her position on the contested bill, she must pay it or do without electricity.

Clearly then, the right for which the plaintiff now contends is to continue to receive the service and, we assume, pay for it on a current basis until such time as a decision can be had on the disputed items.

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[9] Shelton, The Shutoff of Utility Services for the Poor, 46 Washington L.R. 745, comments that the state of Washington by constitution and statute permits free service to indigents, but apparently there are no requirements that it in fact be done.

[10] *See* the discussion in Michelman, The Supreme Court 1968 Term, Foreward: On Protecting the Poor Through The Fourteenth Amendment, 83 Harvard L.R. 7 (1969).

The utility's response is that the plaintiff may pay the contested charge and then claim for a refund. This process, it is assumed, may be handled informally and perhaps without the necessity of going to court.[11] Though not explicitly stated as such, there is an underlying premise in plaintiff's position that because her income is limited to payments made by the Department of Public Welfare, the refund claim process is not a practical alternative to her. If we are to accede to this contention though, it should apply to every indigent person, not only as to past due bills, but current ones as well. While there may be argument that this would be a socially desirable development,[12] it has not yet been suggested as a constitutionally mandated one or one compelled by congressional enactment.

Plaintiff also asserts that she should be given reasonable notice before her service is terminated. But the defendant has already agreed with that proposition—its tariff provides that "reasonable notice must be given before termination."[13] She thus has been given that right which can be enforced in the state courts or by the Public Utility Commission—at certainly no more expense or inconvenience than resort to the district court required.

Again, we note that the termination of the electricity did not occur until after the plaintiff had been contacted by two representatives of the defendant and had been made aware of irregularities in her account.

[2] Essentially then, if the plaintiff is to prevail, she must establish that the procedure of suing for refund

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[11] While it has been asserted that few of these cases result in litigation because of costs and the small amount involved, we point out that the district magistrates of Pennsylvania and the Small Claims Tribunals of the Common Pleas Court offer opportunities for the customer to present his case at little expense and without the necessity of employing counsel.

[12] *See* Shelton, *supra*, f.n. 9.

[13] Plaintiff has not raised in brief or argument any objection to the provision in the tariff reserving the right to discontinue without notice in the event that there has been tampering with the meter by the customer. Since there is no evidence that it is applicable here, we do not consider it.

after payment of the amount claimed to be due is a violation of due process.

While this method of resolving disputes may be harsh and undesirable, we cannot say that it is unconstitutional. Flora v. United States, 362 U.S. 145, 80 S.Ct. 630, 4 L.Ed.2d 623 (1960), discusses the history and procedures of collection of revenues due the United States which in many instances involves payment of the tax first and then filing a suit for refund. *See also* Great Lakes Dredge & Dock Company v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), where the Court did not disapprove a similar procedure in a state tax collection matter.

There has never been any indication from the Supreme Court that this procedure does not comport with constitutional requirement of due process. The reason given for such drastic procedures, that is, that the revenue must be collected in order to keep the government in operation, is the very same argument the utilities invoke as grounds for requirement of payment before further service is rendered.

[3] Plaintiff maintains, also, that because of its importance to everyday living, the right to receive utility service rises to the level of a constitutional right or an entitlement from the state.[14] She cites Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), as expository of the doctrine that a person may not be deprived of a privilege or right by the state without a hearing. But while that case provides that the state is limited in the procedures that it may use to revoke or suspend an existing driver's license, there is no com-

[14] The "entitlement" cases generally deal with a privilege or right conferred by the state of something which it alone can grant, e.g., in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971), only the state, not a private company, can issue a driver's license; only a state by appropriation and legislative action may administer and disburse welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1971), was concerned with the effect of state statutes on the owner's right of possession of personality. We do not believe that there is a property right to be furnished utility service without payment.

pulsion to issue one without payment of the customary fee. Moreover, we think that the wrong criterion has been applied. All of life's vital concerns have not been entrusted to the central government, and many, if not most, repose in the state or its agencies. Even so fundamental a human requirement as that of decent shelter has been said not to have a specific constitutional guarantee. Thus, in Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972), the Court said:

> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement."

The *Lindsey* case dealt with a summary form of eviction used in Oregon which required payment by the tenant in order to maintain possession and required that any defenses other than payment be reserved to a separate suit. Thus, it is akin to the theory used by the utility in this case, that is, pay first and litigate later. The Supreme Court in the *Lindsey* case found no constitutional objection to such a procedure.[15]

So, too, in San Antonio Independent School District v. Rodriguez et al., 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), a case dealing with the admittedly important role of education in our society, the Court said:

> "But the importance of a service performed by the State does not determine whether it must be regarded

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[15] The fact that we find no constitutional prohibition to this procedure does not mean that we approve it or recommend it. If we were free to substitute our judgment for that of the PUC and the state legislature, we would require the utility to continue service on payment of current charges while the disputed matters are litigated and allow a time payment arrangement for financially * * *.

as fundamental for purposes of examination under the Equal Protection Clause."

And so, although the plaintiff's position has strong appeal, that is not enough to establish a constitutional basis. We must be alert to the fact that in granting a federal remedy to what is essentially a state problem, there is a further extension of the power of the central government. Intervention is justified in some instances and indeed may be an absolute necessity at times, but such action should not be taken without recognizing the effect there may be upon the concept espoused by the framers of the Constitution that one of the best ways to prevent excessive and abusive government is to disperse its power among many entities and at various levels.

A reluctance, therefore, to enlarge the authority of the federal courts should not simply be viewed as a lack of appreciation for the rights of the individual but, rather, as an indication of concern for the most appropriate method of maintaining the proper balance between governmental power and the citizen's liberties.

Of course, much depends upon the circumstances, and in this case we find no overriding justification for utilization of the Civil Rights Act to intrude the federal courts into what is and should remain a state regulatory process.

[4] Simply stated, we do not find that a right to receive utility service pending resolution of a dispute between a customer and the company is protected by the Constitution of the United States.

[5] Thus, although we would find that there is no federally protected right involved here, we agree with the approach of the district court in applying a narrow view of the "color of state law" test in the weighing and sifting process in the circumstances of this case.[16] We find no error in the decision of the learned District Judge, and the judgment of the District Court, therefore, will be affirmed.

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[16] *See also* Silas v. Smith, 361 F.Supp. 1187 (E.D.Pa.1973).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-1745

CATHERINE JACKSON, On Behalf of Herself
and All Others Similarly Situated,
APPELLANT

v.

METROPOLITAN EDISON COMPANY

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, WEIS and GARTH, *Circuit Judges*, and SCALERA, *District Judge*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Judge

Dated: October 25, 1973

SUPREME COURT OF THE UNITED STATES

No. 73-5845

CATHERINE JACKSON, ETC.,
PETITIONER

v.

METROPOLITAN EDISON COMPANY,

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Third Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 19, 1974

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